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IN THE

Supreme Court of the United States

October Term, 1967

No. 708

CLOUDIES SHINALL,

Petitioner,

v.

STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE

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No.

CLOUDIES SHINALL,

Petitioner,

v.

STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi, entered on May 15, 1967, in the above-entitled cause.

Opinion Below

The opinion of the Supreme Court of Mississippi is reported at 199 So. 2nd 251 and is appended hereto (in Appendix A) *infra*, at page 1a.

Jurisdiction

The judgment of the Supreme Court of Mississippi affirming the conviction of petitioner in the Circuit Court of Forrest County was entered on May 15, 1967.

A Suggestion of Error was overruled on June 12, 1967. Jurisdiction to review the judgment of the Supreme Court of Mississippi is granted to this Court under the provisions of Title 28 U.S.C. § 1257(3). Application for an extension of time to file this petitioner to and including October 10, 1967, was granted in an order issued by Mr. Justice Black dated September 5, 1967. . .

Statutes Involved

MISSISSIPPI CODE ANN. 1942

§ 2215. Homicide, murder, defined.

The killing of a human being, without the authority of law, by any means or in any manner, shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others, and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, arson or robbery, or in any attempt to commit such felonies.

Section 2218(f)

Homicide—justifiable homicide: The killing of a human being by the act, procurement or omission of another shall be justifiable in the following cases: . . .

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a

felony or do some great person injury, and there shall be imminent danger of such design being accomplished.

§ 2225. Homicide—killing unnecessarily, while resisting effort of slain to commit felony or do unlawful act.

Every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter.

Questions Presented

1. Whether the due process clause of the Fourteenth Amendment is violated where the State, by judicial fiat, prevents an accused from defending himself against a capital charge?

2. Whether a conviction and death sentence procured after indictment and trial by grand and petit juries which did not reflect a cross-section of the community, from which women were excluded by statute and Negroes excluded by reason of their race, violates the equal protection and due process clauses of the Fourteenth Amendment?

Statement

Prior Proceedings:

Petitioner was convicted of deliberate murder as defined in § 2215, Miss. Code Ann. (1942) on August 6, 1966. He appealed to the Supreme Court of Mississippi which affirmed the conviction and subsequently on May 15, 1967 overruled his Suggestion of Error. Petitioner prays that this Honorable Court issues a writ of certiorari to review the judgment against him.

Evidence Presented:

Petitioner, a Negro youth, was nineteen years of age at the time of his indictment, and a resident of Palmer's Crossing, a Negro community adjacent to Hattiesburg, Mississippi. He was convicted of the murder of Frederick L. Humphrey, a white constable of Forrest County, Mississippi. The jury did not recommend mercy and the death penalty was imposed.

Petitioner was arrested on March 27, 1965; a preliminary hearing was not held until April 13, 1965 and he was originally arraigned on July 15, 1965. He has been incarcerated in penal institutions of the State of Mississippi since March 27, 1965.

Humphrey's death occurred on March 26, 1965, in Palmer's Crossing, an area within the official jurisdiction of former constable, Wilmer Kitchens. Although Humphrey was officially assigned to another beat, he and Kitchens operated as a team in Kitchens' beat or assigned area which encompassed Palmer's Crossing (R. 722-23; 766; 1110; 1112; 1254). Together, the two pursued a pattern of harassment, intimidation, abuse and brutality toward the Negro citizens of Palmer's Crossing (R. 796-97; 1224-25; 1236; 1177-80; 1221-23; 1234-36; 1260). It was the practice of the two constables to frequent the restaurants and cafes in Palmer's Crossing (the only places of recreation in the area) and arrest the male patrons or occupants for various reasons, generally of an insubstantial nature. Under Mississippi law, constables received increased remuneration based upon the number of arrests made. (Section 3949, Miss. Code Ann. 1942). Significantly most arrests were made on Saturday evening, pay day in the community (R. 1254; 1280).

A week prior to Humphrey's death, he had arrested petitioner and others and charged them, indiscriminately, with gambling and/or profanity. In the course of the

arrest Humphrey pushed petitioner about and attempted to slam the car door on his leg. During the drive to the jail, both Kitchens and decedent threatened petitioner (R. 1299-1300). The arrest was made in the usual manner resorted to by the Humphrey-Kitchens team; Kitchens remained outside shining his flashlight in the window, indicating who should be arrested, and Humphrey entered the building and took into custody those designated for arrest (R. 1077; 1254).

On the afternoon of March 26, 1965, petitioner borrowed a car from one L. C. Leggett for the purpose of picking up his pay check (R. 923). During most of the day he was accompanied by James Anderson and Lewis Willie Smith; the three rode about the Palmer's Crossing neighborhood, where they stopped at two or three cafes, the last of which was "Bammer's Place," the combined home and business place of a Mrs. Bammer Madison. Sometime during the course of the drive, Leggett's gun encased in holster and attached to a belt, became dislodged from under the front seat of the car and was discovered by the three occupants shortly before they entered "Bammer's Place" (R. 969-970). Petitioner had no prior knowledge of the gun's existence nor of the fact that Leggett kept it in his car under the seat. Anderson and Smith testified that petitioner wore the holster while in "Bammer's Place" and that the episode had been in the context of a joke, devoid of serious implications (R. 1066; 1094). Constables Kitchens and Humphrey drove up to "Bammer's Place" while the three were inside; Kitchens entered and left within a few minutes. Before Kitchens entered, petitioner had removed the holster and given it to Mrs. Madison who returned it after Kitchens departed. The holster and gun were replaced under the front seat of the car (R. 1096).

The appearance of the constables in "Bammer's Place" precipitated a conversation among the occupants, includ-

ing petitioner, concerning a recent incident of harassment by decedent. At approximately 6:00 p.m. on that same evening Lewis Perkins and several other young men were in another cafe when Kitchens and Humphrey entered it. Although there was no evidence of gambling the group was accused and taken outside. While Humphrey was searching some of those detained, Perkins ran around the house whereupon Humphrey shot at him twice (R. 1197-1198). Humphrey then proceeded to another cafe, the "Blue Flame" and boasted that he had just "shot at some niggers" (R. 1207).

The trial court excluded from the jury the testimony of Charles Hall, an employee at the "Blue Flame". Between 6:30 and 7:30 the same evening, shortly after firing his pistol at Perkins, Humphrey appeared with Kitchens at the "Blue Flame" cafe where they asked for and were served a pint of gin. Hall testified that the two contables "split" the pint, consuming it mixed with orange juice (R. 1306-19). Humphrey then proceeded to the "Heat Wave."

After dark, shortly before 8:00 p.m., petitioner together with Smith and Anderson, left "Bammer's Place" in the borrowed car intending to pick up Leggett from his place of employment (R. 1097). As the car approached a point in the road adjacent to the "Heat Wave", petitioner reduced his speed in an attempt to traverse a ditch in the road. The unrepaired road caused the car to stall twice (R. 1026). While petitioner was attempting to restart the car and continue his errand, Humphrey emerged from the "Heat Wave", approximately 15 feet to the rear of the car and directed his flashlight toward it (R. 979). Petitioner succeeded in starting the car, whereupon Humphrey promptly got into Kitchens' car which was parked in front of the "Heat Wave", and began to pursue petitioner's car, flashing the official red light (R. 984, 1100, 1113). As Humphrey continued the chase, petitioner began to pursue a circuitous route.

Anderson who testified that Leggett's car "took off fast," and explained that he referred not to the speed of the vehicle but to the fact that the tires spun on the gravel road as the car started (R. 1026). Leggett testified that his 1956, nine-year-old Chevrolet car with a hydromatic transmission was incapable of starting fast (R. 942). Smith's conception of speed was based upon fear occasioned by the pursuing vehicle (R. 1129-30).

From the point where the car had stalled petitioner traveled approximately 150 yards left onto another road; he proceeded to the next intersection, turned right into a dirt road and proceeded for approximately another two hundred yards; he made two additional turns and as he attempted to round a sharp curve, the car went out of control and came to a stop in the driveway of the home occupied by the family of Andrew Wilborn (R. 1029-33).

The highest speed reached by petitioner, according to the testimony of Anderson, was between 50-55 miles an hour; this occurred at the end of the ride, on the gravel road. The legal speed limit provided in Section 8176, Miss. Code Ann. 1942 is 60 miles per hour. Both Smith and Anderson testified that they had all been frightened because of the unprovoked pursuit of the car by Humphrey (R. 1029-30; 1060). Smith stated that he was frightened because the constable was following the car even though they had done nothing and testified further that he knew Humphrey would put them in jail without regard to infractions of the law (R. 1114-5).

Constable Humphrey, who had continued his pursuit of the car, stopped his vehicle at a right angle to that of petitioner, got out of the car and approached the other vehicle a lighted flashlight in one hand and his drawn gun in the other. He ordered the occupants out of Leggett's automobile. Anderson testified that both he and Smith got out of the car at the command of the constable; Smith testified that he was out of the car before Humphrey

reached it. After both had alighted, Humphrey leaned into the car. Anderson heard a shot. Smith saw a blaze of gun fire and both immediately ran from the scene. Neither Smith nor Anderson saw a shot fired but testified to having heard three shots fired within a period of 35-40 seconds (R. 1102-03; 1105). A slug which entered Humphrey's throat caused his death.

Leggett, Anderson and Smith were arrested the next day, and were kept in custody in jail until their appearance at the trial. All three testified that they had seen petitioner later in the evening of March 26. According to Leggett, his entire conversation with petitioner was confined to petitioner having volunteered the information that he had killed an "s.ob.", naming Humphrey. Anderson spent several hours with petitioner; their only conversation consisted of petitioner stating that after Humphrey fell, he walked up to him and "shot the s.o.b. in the head" (R. 1008). Smith who met and talked to petitioner at the same place as did the other two, said there was no conversation about any shooting (R. 1074).

Andrew Wilborn, age fifteen, who heard the approach of the two automobiles and looked out of his front window, established that Humphrey was not shot after he fell. The perimeter of the illuminated area did not extend to the place where petitioner's car had stopped. Wilborn testified that he heard the two cars stop but could only see the trouser legs of Humphrey as he walked into the yard. Wilborn heard three shots fired in sequence. A man whom he later determined to be Humphrey ran onto the porch, asked for help, turned, walked off the porch and fell to the ground. At the time Humphrey fell to the ground, the only car in the area was that driven by Humphrey. No shots were fired after Humphrey fell (R. 1146-47; 1149). Petitioner made no attempt to leave Palmer's Crossing; he was arrested the next day in a home in that area.

Fundamental to petitioner's defense was his apprehension for his life at the time Humphrey approached the car. Despite this fact the trial court refused to admit into evidence testimony showing the basis for this apprehension. Thus, although one witness was allowed to testify that both constables worked together "mostly on weekends" and to her knowledge of incidents in which the decedent abused and beat Negroes (R. 1289). The court excluded most of the proferred evidence bearing upon this defense. For example, there was excluded the testimony of Sheriff Gray that he had received complaints from the residents of Palmer's Crossing relating to the misconduct of the constables of mistreatment of petitioner by the decedent and Kitchens, and of the unlawful assaults of females by the two constables (R. 797-800; 16a-18a). Leggett attempted to testify that prior to March 26, 1965, Humphrey and Kitchens had sent bullets to petitioner together with a threatening message, but he was precluded by the Court from describing the incident (R. 946).

The jury was not permitted to hear testimony of witnesses as to continuous unprovoked indiscriminate beatings of Negroes in Palmer's Crossing by the decedent nor was there allowed Mrs. Madison's graphic description of how decedent had physically abused a woman whom he was attempting to arrest in her business place. Similarly, the Court excluded testimony by petitioner's mother Mrs. Shinall, Mildred Adams and E. D. Sullivan of their personal experiences of unprovoked physical attacks by decedent (R. 1205; 1227; 1260; 1269). The testimony of Mrs. Adams and Mr. Sullivan as set forth in the Appendix B is an example of the tenor of the excluded evidence (19a-32a). Additionally there was proffered through witness Madison evidence of an unmerciful beating administered to petitioner by Kitchens, the event which apparently commenced the vendetta evidenced by the later threats to petitioner by the decedent and Kitchens (R. 1223-241). Mrs. Mary

Jones proffered testimony on an occasion that when she tried to explain that a boy, whom Constable Kitchens was trying to question, had failed to respond because of a speech defect, she was struck, arrested and charged with intefering with an officer (R. 1264-65). Mrs. Flora Jane Russell proffered testimony that while sitting in their automobile, she and her husband were arrested by the decedent and taken to jail. While Humphrey detained Mr. Russell at the jail, Kitchens and two of his cronies took Mrs. Russell in the official vehicle to a wooded area and attacked her.[1] The significance and importance of these facts is clear; they establish the existence of a pattern or abuse of citizens by the decedent and Kitchens and that these incidents were well known in the community; as a result there was general and well founded fear of the two constables (R. 1179; 1182; 1157). Evidence of the prevailing reign of terror within the community is directly relevant to the reasonableness of petitioner's apprehension—a statutory element of his lone defense.

The total population of Forrest County was judicially noticed to be 52,722. Of that total, 37,970 are white; 14,719 are Negro; accordingly, Negroes constitute 26% of the county's population according to the 1960 census (R. 63). Prior to the January, 1965, terms of the Circuit Court, no members of the Negro race had ever served on a grand jury. Since that time two Negroes served for the July Term, 1965; three Negroes served for the November Term, 1965; for the March Term, 1966 two Negroes served and at the July Term, 1966, four Negroes served. No women have ever served on grand or petit juries (R. 61).

Thereon Lynd, circuit clerk of Forrest County, testified that the names of eligible grand and petit jurors are placed

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[1] Mrs. Russell has testified to this incident on two occasions. As yet no criminal charges have been filed against Kitchens who has been relieved of his office partially as a result of Sheriff Gray's investigation of his activities.

in boxes by members of the Board of Supervisors (R. 66). The supervisors file a list; both the slips to be placed in the boxes and the lists are kept in his other office, *i.e.*, the clerk's office. The lists are prepared from poll books and there are 59 poll books for the county with separate books for each beat or district (R. 67). Lists are prepared at various times during the year, the times apparently determined by the particular supervisors involved and the needs to be met. Lynd estimates the racial breakdown of registered voters after July, 1965, to be 16,000 whites and 2,500 Negroes. According to records filed by Lynd as a result of an injunction requesting him to cease refusing Negroes the right to register, Lynd had registered 1,445 Negroes. The judge has never authorized the Board of Supervisors to place the names of freeholders in the jury selection boxes (R. 75).

There are separate boxes kept for each beat in the county. Of each 12 men drawn by the sheriff for jury duty, five are drawn from Beat 1, two from Beat 2, three from Beat 3, one from Beat 4 and one from Beat 5 (R. 66). Lynd stated that the poll books do not reflect the race of the voters.

The Chancery Court of Forrest County, Clyde Easterling, clerk of the Board of Supervisors, testified that each of the Board members prepares the slips reflecting qualified jurors from qualified voters in the poll boxes and that poll books are the only source used for the selection of jurors (R. 76). He does not check the slips placed in the boxes against the lists but certifies the slips which are tendered by Board members as a matter of course (R. 77).

The same method of selection employed for years in the past is used. William Sigler, Supervisor of District 1, Beat 1, testified that of the approximately 16,000 persons registered in the county, half are from his district. Approximately half of the qualified electors are women (R. 86). He prepares his lists by taking the names in alphabetical order from each poll or precinct book. He lists between 50

to 100 persons at one time (R. 80). As each precinct book is exhausted alphabetically, he proceeds to another. As a result, for two or three successive terms jurors from certain precincts are not called by reason of his method of selection. Accordingly, jurors are not made available from the entire county or on a broad basis at each listing (R. 81). He excludes from his lists those who have served on juries during the past two years and all women. Despite the requirements of § 1766 of the Mississippi Code, Ann. that supervisors in making a list "shall select and list the names of qualified persons of good intelligence, sound judgment and fair character," he makes no effort to determine who the jurors are and is of the opinion that his method accords with the statute. He does not place freeholders on the lists, only qualified electors (R. 82-83). Five of each twelve prospective jurors selected during a term come from his beat.

J. A. P. Carter, Supervisor of District 4, testified that prior to elimination of the poll tax, he had between 750 and 1,000 qualified electors in his district (R. 90). His method of selection is similar to that of Supervisor Sigler. Supervisor Carter testified that he includes 20, 30 or 40 names at each listing but never as many as 100 (R. 89). His list is prepared from the four precinct books in his district and he proceeds alphabetically through each book. He selects no minimum or maximum number; he stated that when he gets "tired," he "quits" (R. 90). He eliminates from the list persons who have served during the past two years and women, and makes no investigation nor any effort to determine who the persons are that are selected (R. 91).

Two white Hattiesburg attorneys testified for the State. Rex K. Jones, a member of the Legislature who has been practicing in Hattiesburg since 1961, stated that he tried two criminal cases in the "past year" where Negroes sat as petit jurors (R. 95). In many instances, he has excused them (R. 96). Robert Lennon, who has practiced in Hattiesburg for two years (since 1964), testified that

he had defended a Negro female named Rosemary Burton for[1] murder and that one or two Negroes remained on the petit jury (R. 98). He "imagined" that the State had peremptory challenges remaining at the time. In two non-capital cases, one for grand larceny and burglary and the other for narcotics, he "allowed" two Negroes to sit on the jury (R. 99). Despite the stipulated and judicially acknowledged fact that no Negroes had served as grand jurors prior to January, 1965, both Lennon and Jones recalled Negroes sitting on grand juries prior to that date (R. 96; 98).

Procedure Below: Preservation of Federal Questions:

Petitioner's pre-trial motion to quash the indictment because of discriminatory selection of grand jurors, exclusion of Negroes and women from that panel and denial of a preliminary hearing for some 17 days in violation of his rights to due process and equal protection of the laws granted by the state and federal constitution was overruled (R. 6-7; 100-101). A special venire drawn for trial in this case was exhausted and an existing list of jurors was used to complete the selection of the jury (R. 425). Petitioner's motion to quash the special venire, the venire and the petit jury empaneled in this cause was based upon discriminatory selection of jurors, and failure of the jury selection system to produce a representative cross section of the community. The motions, citing violations of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, were denied (R. 121-125; 160; 280-81; 491; 662).

Petitioner requested the right to make an opening statement in order to delineate the defense of self-defense. The motion was overruled (R. 615; 679-680). Throughout the

[1] Case No. 6454 from the docket books of the Circuit Court of Forrest County reflected the case of Burton v. State which concerned the trial of a Negro for having killed another Negro.

trial, where evidence relating to justifiable homicide was excluded, petitioner pressed and explained his objections; all were overruled (R. 1220; 1231; 1238; 1250). Exceptions to these rulings, due process violations, were included with all other issues raised in the motion for directed verdict at the conclusion of the trial (R. 1322-23). At the termination of the state's case, petitioner moved for a directed verdict delineating, among the grounds cited unconstitutional jury selection process in violation of the Fourteenth Amendment and failure to prove the case beyond a reasonable doubt (R. 1322-23). Included in this motion was the argument that there was insufficient evidence of *deliberate* murder as set forth in § 2215, Miss. Code Ann. (1942) (R. 1135-37; 1323). The motion was denied (R. 1323). This motion for a directed verdict which included all grounds previously stated to the Court was renewed at the end of petitioner's case; the motion was denied (R. 1323).

Preserved within the objections and motions made during the course of the trial was the failure of the Court to excuse a juror for cause (R. 647); use of a hypothetical question not limited to the facts in evidence; admission of evidence and exhibits relating to wounds sustained by the decedent which did not result in his death (R. 862) and errors in instructions rendered by the Court (R. 1347-55)[2]. The profusion of errors was urged as sufficient to constitute denial of due process of law and the motion was similarly denied (R. 1323).

After judgment of conviction and imposition of the death penalty, petitioner moved to set aside the verdict or

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[2] The State of Mississippi utilizes a procedure for instructions whereby each side submits requested instructions to the Court. They are subsequently reviewed by the Court and prosecutor, then ruled upon by the trial judge. The charges are read to the jury by the counsel offering them only in the form submitted so that there is no opportunity for explanation by the court.

for a new trial incorporating all grounds previously raised. Cited specifically was failure of the State to prove deliberate murder, the offense charged in the indictment; and insufficient evidence to warrant conviction for deliberate murder because petitioner had acted in self-defense. This motion was denied on August 9, 1966 (R. 1356-60, 1361). Petitioner moved for and was granted an appeal in *forma pauperis* on August 19, 1966 (R. 1365).

Assignments of Error were filed with the Supreme Court of Mississippi preserving all objections raised below. The Supreme Court of Mississippi ruled on a single federal question, whether the totality of proceedings in the case violated petitioner's right of due process of law under the Fourteenth Amendment. It found no violation of the Fourteenth Amendment on that limited basis but did not specifically rule on other federal questions presented (12a).

Reasons for Allowance of Writ

1. The judgment of conviction for murder by deliberate design (for which the death penalty has been imposed) secured by denying petitioner his right to defend himself, constitutes a deprivation of due process of law in the most elementary sense and conflicts with the *ratio decedendi* of *Washington* v. *Texas*, — U.S. —: 18 L.ed. 2d 1019; 35 L.W. 4675 (decided June 12, 1967). The right to defend against a capital crime is so integral a part of our concept of ordered justice that denial or impairment of the right is, *a fortiori*, a deprivation of due process of law. *In re Oliver*, 33 U.S. 257, 69 S. Ct. 499 (1948); *Hovey* v. *Elliot*, 167 U.S. 409, 17 S. Ct. 841 (1897); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106, 54 S. Ct. 330 (1934).

In *Washington* v. *Texas, supra*, this Court held that the confrontation clause of the Sixth Amendment included the right to offer testimony, and ". . . in plain terms the right to present a defense, the right to present the defendant's

version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." This Court continued:

> Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

For directly related reasons, the prosecution is constitutionally precluded from the use or introduction of false evidence and from suppression of exculpatory facts. Convictions obtained through employment of these methods cannot stand consistent with the Fourteenth Amendment. *Miller* v. *Pate*, — U.S. —, 87 S. Ct. —; 17 L.Ed. 690; *Mooney* v. *Holahan*, 294 U.S. 103, 55 S. Ct. 340 (1955); *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1954); *Alcorta* v. *Texas*, 355 U.S. 28, 78 S. Ct. 103 (1954). In its review of these cases, this Court has been cognizant of the irreparable adverse effect of such evidence upon a convicting jury disabled, by the State, from affording a fair hearing. *Douglas* v. *Alabama*, 380 U.S. 415, 420, 85 S. Ct. 1074 (1965); *Alcorta* v. *Texas, supra.* The denial of due process inherent in such proceedings results from the State's interference with the "fair and impartial hearing" requisite to a valid conviction. A "fair and impartial hearing" is the very bedrock of the Sixth Amendment and mandates inclusion of the protection intended by that Amendment within the due process clause of the Fourteenth Amendment.

Washington v. *Texas, supra,* abrogated a procedural statute which disabled the defendant from eliciting testimony in his defense from a co-defendant. Because the effect of this rule was to inhibit and deny the right to defend, it violated federal constitutional guarantees. This thesis is consistent with the decisional authority developed

by this Court and reflected in *Lisenba* v. *California,* 314 U.S. 219, 62 S. Ct. 280 (1941).

> The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce such rule as she elects, whether it conform to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession (314 U.S. at 236).

See also *Fahy* v. *Connecticut,* 37 U.S. 85, 84 S. Ct. 229 (1963).

The fundamental principles of justice secured by the due process clause and enunciated in these decisions were extinguished by the procedure utilized to effectuate the conviction of petitioner. Nothing is more elemental to due process than the right to defend oneself against a crime, for which one's life may become forfeit.

The *sine qua non* of self-defense or justifiable homicide is the reasonable ground of the accused to apprehend a design of some great injury to himself and imminent danger of the accomplishment of that design. (Section 2218(f), Miss. Code Ann. (1952), *infra,* p. 2.) These elements must be evaluated from the perspective of the accused; exclusion of evidence elucidating that perspective successfully emasculates the defense of justifiable homicide, particularly whereas here that issue is considered by a jury. By preventing presentation of such evidence, the court below denied petitioner the right to present a defense. The constitutional injunction, against the preclusion of this right by statute, recognized in *Washington* v. *Texas, supra,*

is equally applicable to the same denial of due process accomplished here by judicial fiat. *Lynumn* v. *Illinois,* 372 U.S. 528, 83 S. Ct. 917 (1963); *Sims* v. *Georgia,* — U.S. —, 87 S. Ct., 17 L. ed. 2d 593 (1967). The procedural statute struck down in the *Washington* case had its genesis in rules of evidence. The court below applied rules of evidence so as to render all defense testimony inadmissible. The effect is the same as in *Washington;* the jury is exposed only to the prosecution's evidence and the right to obtain witnesses vital to the defense is suppressed.

Fragmentation of this single issue into technically subdivided rules of evidence resorted to by the court below for *ad hoc* support of the trial court's rulings does not disguise the real issue or eliminate the federal question.

Given the implicit and essential element of self-defense, i.e., the evaluation of impending harm from the standpoint of the accused, the elimination of the evidence which illuminates appearances presented to an accused and upon which he acted was constitutional error.

Beginning with the issue of excluded testimony, the Court below turned its attention to the nature of Humphrey's pursuit of petitioner. Although the record does not reflect Humphrey's intentions, as indeed it cannot, the Court constructed an attempted "lawful arrest" and metamorphized the substantive issue of the right to defend into a series of unrelated and isolated evidentiary questions, which it disposed of on a variety of grounds.

Mississippi has ample decisional authority precluding the dissection of the issue of the right to defend, into a minutiae of splintered evidentiary rulings. Those elements relating to real or apparent necessity for homicide and to the reasonableness of that belief by an accused are admissible and related to the state of petitioner's mind. *Bell* v. *State,* 42 So. 2d 728 (1949); *King* v. *State,* 65 Miss. 576 (1888); *Evans* v. *State,* 44 Miss. 762, 772-73 (1870); *Lee* v.

State, 160 Miss. 618, 134 So. 185 (1931). That these same elements may or may not be relevant to the activities or state of mind of the decedent is immaterial. The myopic view of the court below is inconsistent with both Federal and State law and requires vacation of the judgment of conviction.

2. The affirmance of the conviction for deliberate murder and direction for execution of the death penalty is totally inconsistent with the legislative direction in Section 2225, Miss. Code Ann. 1942 that an unnecessary killing while resisting an unlawful arrest subjects an accused to no greater charge than manslaughter and with decisions making that section applicable to unlawful arrests by private persons or peace officers. The decision below raises additional constitutional issues requiring review by this Court. It rejects the federal constitutional requisites of probable cause for arrest necessary to satisfy due process of law within the context of the Fourteenth Amendment.

Support for its elaborate dismemberment of the issue of the right to defend into an array of isolated evidentiary questions is posited upon the legalization of an unlawful arrest. The court below stated that Mississippi law supports the thesis that "... a person may resist an unlawful arrest by such force as may be necessary, short of taking human life", and that "... under the facts here presented, the constable was attempting to make a legal arrest." This conclusion is based upon the finding that: "... in the instant case the constable did not begin pursuit of the defendant until *after* the defendant had driven away at such a fast rate of speed his companions became alarmed for their safety", and that single act constituted "reckless driving, a misdemeanor under the statutory law of Mississippi" (6a-7a).

Where federal constitutional rights are involved findings of state courts are not insulated against examination

by this Court. *Spano* v. *New York,* 360 U.S. 315, 316, 79 S. Ct. 1202 (1959); *Thomas* v. *Arizona,* 356 U.S. 390, 393, 78 S. Ct. 885 (1958); *Pierre* v. *Louisiana,* 306 U.S. 354, 358, 59 S. Ct. 536 (1939). Independent examination of the evidence is required to properly evaluate the constitutional questions posed herein.

The conclusions of the Court below are not supported by the record and require scrutiny by this Court. The automobile driven by the petitioner was nine years old in 1965; the owner of the automobile testified that the automobile was incapable of starting with any appreciable degree of speed. The testimony of James Anderson that the car "took off fast" was based upon the fact that the wheels spun as the car started. The top speed of the car, approximately 55 miles per hour, was not reached until just before it stopped and after it had traveled in excess of 500 yards. Smith's fear was caused by the pursuing car and by his conviction that even though they had done nothing, Humphrey would put them in jail or otherwise injure them (R. 1115-16).

The court below has chosen to overlook the uncontroverted evidence that Humphrey's pursuit of the car began *immediately* upon petitioner driving away and failing to respond to the flashing of the light. Anderson testified that Humphrey immediately got into Kitchens' car and began to chase the car driven by the petitioner and that he knew that they were being pursued because of the flashing red light operating on the Constable's car. The law of Mississippi is clear. Probable cause for arrest or for any official act must be evaluated at the commencement of pursuit. Where there is no reason to believe that a felony has been committed, an officer may not make an arrest until it is sufficiently evident that there is taking place in his presence the commission of a crime or an attempted or threatened breach of the peace. In *Smith* v.

State, 240 Miss. 738, 128 So. 2d 857 (1961), the court below stated:

> And an arrest begins when an officer begins his pursuit for the purpose of making an arrest. If an officer does not have the authority to make an arrest at the instant he begins his pursuit for the purpose of making the arrest, the fact that the person the officer is pursuing violates the traffic law in making his escape does not thereby authorize the arrest that began unlawfully, because an officer who attempts an unlawful arrest cannot later arrest a citizen for resisting such trespass.

See also *Butler* v. *State,* 135 Misc. 885, 101 So. 193; *Harris* v. *State,* 209 Miss. 183, 46 So. 2d 194; *Lewis* v. *State,* 198 Miss. 767, 23 So. 2d 401. There having been no violation of the traffic laws prior to commencement of the pursuit, *Smith* v. *State, supra,* is not distinguishable. The reason for the attempt by the court below to distinguish *Smith* v. *State, supra,* becomes apparent when that case is read in conjunction with *Shedd* v. *State,* 203 Miss. 544, 33 So. 2d 816 (1948), which reversed a conviction for murder of a policeman in the case because the defendant had killed an arresting officer while resisting an unlawful arrest. Because of insufficient facts to justify the arrest, § 2225 Miss. Code Ann. (1942) became applicable. Homicide committed while resisting an unlawful arrest subjects an individual to no charge greater than manslaughter. *Bergman* v. *State,* 160 Miss. 65, 133 So. 208 (1931) and *Cryer* v. *State,* 71 Miss. 470 (1893).

The standard imposed by the Fourth Amendment's requirement of probable cause has been stated by this Court:

> If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient. *Stacey* v. *Emery,* 97 U.S. at page 645.

The *ex post facto* conversion of an unprovoked pursuit into an attempted lawful arrest is not warranted by the facts.

Probable cause for arrest is a federal question controlled by federal law and circumstances and facts alluded to by the Court below as a basis for an "attempted lawful arrest" are insufficient under the standards imposed by the federal constitution. *Giordenello* v. *United States,* 357 U.S. 480, 78 S. Ct. 1245 (1958); *Mapp* v. *Ohio,* 367 U.S. 643, 81 S. Ct. 1684 (1961).

3. Mississippi's process for jury selection, commencing with the elimination of women as potential jurors, reflecting discrimination by the State against Negroes serving as grand and petit jurors and failing to produce prospective jurors representative of the community, violates the equal protection and due process clauses of the Fourteenth Amendment. *Smith* v. *Texas,* 311 U.S. 128, 61 S. Ct. 164 (1941); *Thiel* v. *Southern Pacific Company,* 328 U.S. 217, 66 S. Ct. 984 (1946); *Ballard* v. *United States,* 329 U.S. 187, 67 S. Ct. 261; *Rabinowitz* v. *United States,* 366 F. 2d 34 (5th Cir. 1966).

The statutory exclusion of all women, as incompetent jurors from the grand jury which indicted petitioner and from the venire and petit jury which found petitioner guilty and imposed the death sentence, is in conflict with principles announced by this Court. *Smith* v. *Texas,* 311 U.S. 129 (1940); *Glasser* v. *United States,* 315 U.S. 60, 62 S. Ct. 457 (1941); *Thiel* v. *Southern Pacific Co., supra*; *Ballard* v. *United States, supra.* Although only a privilege at common law, the right to trial by a fair and impartial jury in States which provide for trial by jury is, in our democratic society, a deeply rooted fundamental right.

Competence to sit on a grand or petit jury is a matter of individual capacity, not a question of group or class. *Thiel* v. *Southern Pacific Co.,* 328 U.S. at p. 220. This Court has rejected the arbitrary and systematic exclusion from jury service of all wage earners, *Thiel* v. *Southern Pacific Co., supra;* all women, *Ballard* v. *United States,*

supra; all Mexican-Americans, *Hernandez* v. *Texas,* 347 U.S. 475, 74 S. Ct. 667 (1954); and all Negroes, *Strauder* v. *States of West Virginia,* 100 U.S. 303 (1880). Although a State may exclude limited and well defined individuals from jury service, excluded classifications may not be arbitrary or capricious. The systematic exclusion by legislative edict of all females from the grand and petit juries which indicted and convicted petitioner is arbitrary and capricious and constitutes an unreasonable classification. The pertinent Mississipi statute does not create an exemption which otherwise qualified females may elect to accept or waive; rather it constitutes a complete exclusion of all females from jury service. Compare *White* v. *Cook,* 251 F.Supp. 409 (D.C. Ala. 1966) and *Hoyt* v. *Florida,* 368 U.S. 57, 82 S.Ct. 159 (1961). See also *Fay* v. *New York,* 332 U.S. 261, 67 S.Ct. 1613 (1947). In *Hoyt, supra* and *Fay, supra,* this Court found it constitutionally permissible for a state to relieve females from jury service unless they elected to serve. The question of the constitutional impermissibility of excluding all females from jury service previously expressly reserved is answered affirmatively in the *Thiel, Ballard* and *Hernandez* cases.

Females constitute approximately 52 per cent[3] of the voting age population in Mississippi and therefore represent approximately one-half of the potentially eligible jurors; accordingly petitioner was denied a trial by a jury truly representative of a cross-section of the community. As this Court noted in *Ballard* v. *United States, supra,* at 193-94:

> It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, back-

[3] See U.S. Census of Population, Miss. Tables 94-96.

> ground, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury were truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

Moreover, the legislative classification in issue herein, is not a limited exemption but a total exclusion, it is wholly without reason or basis in some rational foundation. *White* v. *Crook,* 251 F. Supp. 409 (D.C. Ala. 1966). In *State* v. *Hall,* — Miss. —, 187 So. 2nd 861 (1966) the Supreme Court of Mississippi held that statutory exclusion of all females from jury service was a reasonable classification in light of the State's public policy to continue their service as mothers, wives, and homemakers and also to protect them from the filth of and noxious atmosphere that so often pervade a courtroom during a jury trial. Assuming the validity of the goal of Mississippi's public policy, the method employed by the State to effectuate its policy *i.e.* total statutory exclusion is unconstitutional.

The right to trial by a fair and impartial jury is a fundamental right preservative of many other rights, *Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S. Ct. 1064 (1886); *Reynolds* v. *Sims,* 377 U.S. 533, 84 S. Ct. 1362 (1964), and thus any classification which tends to invade or restrict that right "must be closely scrutinized and carefully confined." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079, 1083 (1966) and cases cited therein. Mississippi

could achieve its express public policy by allowing females an exemption which they might exercise if they so elected. *Fay* v. *New York, supra; Hoyt* v. *Florida, supra.* Nor is the justification for the state policy consistent with State practices through which women are admitted to hold state offices, are members of the state bar, judges, commissioners and reporters in state courts. Moreover females who choose to are freely admitted to all state courtrooms as spectators as indeed they must be. *In re Oliver, supra.* Weighing the importance of petitioner's right to trial by a fair and impartial jury and the importance of maintaining the purity of the jury system against the extreme method Mississippi has chosen to effectuate its public policy, this Court must conclude that the instant cause presents a serious question concerning the administration of criminal justice. See *Ballard* v. *United States,* 329 U.S. 189; *Hoyt* v. *Florida,* 368 U.S. at p. 58.

Additionally, the Mississippi system for selection of grand and petit jurors violated petitioner's constitutional rights to be indicted and tried by a jury from which Negroes were not excluded by reason of their race. *Strauder* v. *West Virginia, supra; Pierre* v. *Louisiana,* 306 U.S. 354, 59 S. Ct. 536; *Whitus* v. *Georgia,* — U.S. —, 17 L. Ed. 2d 599, 35 L.W. 4176 (decided January 23, 1967).

In 1965, petitioner's first conviction was reversed by the Supreme Court of Mississippi because of racial discrimination in the selection of grand and petit jurors. *Shinall* v. *State,* 187 So. 2d 840 (Miss. 1966). The Court below noted that under Mississippi law only male citizens over 21 years of age whose names appear on the poll books and who have paid their poll tax are qualified jurors in Forrest County (Mississippi Code Annotated § 1762 *et seq.*) and as the registrar of Forrest County had engaged in a pattern and practice of racial discrimination against qualified Negro applicants, Negroes were not registered as voters prior to July of 1965 and hence could not possibly serve

on a grand or petit jury in that county. *United States* v. *Lynd*, 349 F. 2d 785 (5th Cir. 1965); *United States* v. *Lynd*, 349 F. 2d 790 (5th Cir. 1965). In affirming petitioner's subsequent conviction the Court below held that:

> The evidence in this case shows that the Supervisors of Forrest County are now selecting juries from the list of qualified voters of that county without regard to race or ethnic groups, and that the constitutional impediment of discriminatory jury selection for which this case was previously reversed has been removed. All qualified persons desiring to vote are not being registered by the Circuit Clerk of Forrest County, and from this list juries are now being drawn. (a) The argument that the juries are still being selected as they have been for years is not well-taken because the list from which the juries are now selected is a new list of qualified voters, including Negro citizens who have registered to vote (5a).

Independent inquiry and determination of disputed facts is required in order to protect and enforce the federal right asserted. *Pierre* v. *Louisiana, supra; Norris* v. *Alabama*, 294 U.S. 587, 55 S. Ct. 579 (1935); *Whitus* v. *Georgia, supra.*

An examination of the record reveals that the jury commissioners selected potential jurors from substantially the *same* voting rolls of qualified electors that had been condemned by the Fifth Circuit in *United States* v. *Lynd, supra,* (R. 67, 77, 80, 89). The only difference between the voting rolls at the time the Fifth Circuit decided *United States* v. *Lynd, supra,* and April of 1966 when the grand jury was assembled is the addition to the rolls of approximately 1445 Negroes out of a potential of 7,595 Negro voters. Out of that 1445, only 534 were males and therefore qualified for jury service.[4] Moreover, at the time the

[4] Statistics from monthly reports filed pursuant to injunction in *U. S.* v. *Lynd, supra.*

grand and petit juries in question were selected, a qualified elector was one who was a registered voter who was not delinquent in his poll tax payments (R. 93). In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966), this Court held the Virginia poll tax unconstitutional as a violation of the Equal Protection Clause. Similarly wealth is a totally capricious and irrelevant factor to any valid juror qualification. The requirement that registered male voters be current in poll tax payments before they were eligible for jury service constitutes one more unlawful qualification for jury service. It was not until April 7, 1966, that Mississippi was ordered to cease requiring the payment of poll taxes as a prerequisite to voting and to jury service, *United States* v. *State of Mississippi* (U.S.D.C. Miss. unreported) approximately the same time that the jury commissioners compiled the jury list for the instant cause. See Mississippi Code Ann., 1942 § 1766. In June of 1967, the Attorney General of the United States found sufficient discrimination against Negroes to certify that federal registrars were necessary in Forrest County to effectuate the command of the Fifteenth Amendment.

There still exists in Forrest County, Mississippi State, discrimination against Negro citizens which prevents them from registering to vote and denies them their resulting right not to be excluded from jury service on the basis of race. During the short period that federal registrars have been operating in Forrest County, the names of 734 qualified Negro citizens who were heretofore denied registration have been placed upon the voting rolls. See *Report of Civil Service Commission Cumulative Totals On Voting Rights Examining*. In effect, Forrest officials have allowed some Negroes to register and therefore to be ineligible for jury service while still denying these rights to most Negro citizens of Forrest County. Practices of token representation similar to the one disclosed in the

instant cause were condemned in *Pierre* v. *Louisiana, supra* (one Negro called within memory); *Smith* v. *Texas, supra* (eighteen Negroes called in seven years); *Patton* v. *Mississippi*, 332 U.S. 463, 68 S.Ct. 184 (1947) (three Negroes called in thirty years); *Cassell* v. *Texas*, 339 U.S. 282, 70 S.Ct. 629 (1950) (twenty-one Negroes called in six years); *Reece* v. *Georgia*, 350 U.S. 85, 76 S.Ct. 167 (1955) (six Negroes called in eighteen years); *Arnold* v. *North Carolina*, 376 U.S. 773, 84 S.Ct. 1032 (1964) (one Negro called in twenty-four years); *Eubanks* v. *Louisiana*, 356 U.S. 584, 78 S.Ct. 970 (1958) (one Negro called in eighteen years). The Constitution nullifies all forms of invidious discrimination. *Gomillion* v. *Lighfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960); *Smith* v. *Texas*, 311 U.S. 128, 132.

Notwithstanding the fact that the above discriminatory practices by state officials limited the number of potential Negro jurors to 534, the jury commissioners drew a special venire of 79 prospective jurors of which the amazing number of 14 were Negroes, a statistical improbability. Of the 14 Negroes who were called, 9 were dismissed for cause while the remaining 5 fell victim to the only peremptory challenges exercised by the State. Thus, although a highly suspectable number of Negroes were called, none survived to serve on the jury. *Cf. Collins* v. *Walker*, 329 F.2d 100 (1964), second petition for rehearing denied, 335 F.2d 417 (5th Cir. 1964), cert. denied, 379 U.S. 901 (1964).

The racially discriminatory system of selection utilized in the instant cause should be reviewed by this Court to determine if petitioner has been denied the equal protection of the laws. In *Whitus* v. *Georgia, supra*, this Court reversed a murder conviction because the jury selection utilized by the State of Georgia was contaminated by the continued presence, albeit in a modified form, of past discrimination practices. So too, in the instant case, Mississippi secured petitioner's indictment by a grand jury

and conviction by a petit jury while utilizing modified forms of past discriminatory state practices to exclude many Negroes from service, solely because of their race or color. Under the decision and principles so recently announced by this Court in *Whitus* v. *Georgia, supra,* this petition must be granted and the conviction reversed.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

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APPENDIX A

Opinion of the Supreme Court of Mississippi

IN THE

SUPREME COURT OF MISSISSIPPI

No. 44,352

CLOUDIES SHINALL,

against

STATE OF MISSISSIPPI,

RODGERS, *Justice:*

This is the second time this case has been appealed to this Court. On the former appeal (*Shinall* v. *State,* 187 So. 2d 840, 1966), we reversed and remanded the case because of an apparent racial discrimination in the selection of the grand and petit juries. When the mandate of this Court reached the Circuit Court of Forrest County, Mississippi, the appellant was reindicted by another grand jury. He was again tried and convicted of murder, and sentenced to suffer death. Appellant has again appealed to this Court and contends that the trial court committed prejudicial error and that a new trial should be granted to him.

The defendant, Cloudies Shinall, appellant here, shot and killed Frederick L. Humphrey, a Constable of Justice of the Peace District No. 3 of Forrest County, Mississippi. The constable was not in his district at the time of the

shooting. The defendant is a Negro, and the constable was Caucasian.

The record reveals that on the day of the homicide, the defendant borrowed an automobile from a friend, L. C. Leggett, for the purpose of going to get his pay check. He took two friends with him, and when they returned to the defendant's neighborhood, Palmer's Crossing, they visited several taverns where they consumed a large quantity of beer. During the afternoon, someone in the automobile with the defendant discovered a twenty-two caliber pistol, holster and belt under the front seat of the automobile. The defendant took the pistol and buckled it upon his person. He exhibited the pistol in one of the beer taverns, and when officers came by the tavern, he gave the pistol, holster and belt to the proprietress. When the officers left, she returned them to the defendant. The defendant and his companions continued to move from one beer tavern to another, until a short time after dark. They got into Leggett's automobile again in front of the "Heat Wave", and started to drive away, but the motor ceased to function at a place where there was a ditch in the road. Thus, the defendant was in the process of navigating the rough place in the road. The constable pointed the light beam of his flashlight toward the automobile; whereupon, the defendant drove away at such a rapid rate of speed his companions became alarmed. They beseeched defendant to slow his speed or stop because they were afraid he would wreck the car and cause their deaths.

In the meantime, Constable Humphrey had gotten into an automobile belonging to another constable and had begun to follow the automobile driven by the defendant. The defendant drove at a rapid rate of speed across a blacktop road and made several turns until he came into a curve in the road in front of the Welborn home. The defendant was going at such a fast rate of speed he

could not traverse the curve and the automobile went out of control into the driveway of the Welborn home, where it struck a wire fence. The constable came up behind the automobile, stopped his car, got out, left the lights burning, and approached the automobile driven by defendant. Two witnesses said the officer had a flashlight in his hand. One witness said he also had a pistol in his hand. The constable directed the passengers to get out of the automobile, and when they alighted, the officer looked into the front seat where defendant was. At this time a gun fired. One witness saw the flash of the gun, and another witness testified that the defendant shot the officer. The two passengers ran away, and when they had gone some distance, they heard two more pistol shots.

Later that night, the defendant told one of his companions that after they fled, he walked up to Humphrey and shot the "son-of-a-bitch in the head." He later told L. C. Leggett, owner of the automobile, that he had killed "the son-of-a-bitch", naming Humphrey, with Leggett's pistol. The pistol was later recovered from Leggett. It was mailed to the Federal Bureau of Investigation, together with a bullet found in the body of deceased by the coroner, and upon examination by them it was discovered that the bullet from the body of the deceased matched the other bullets fired from the pistol of L. C. Leggett, so that an expert witness was able to testify that the bullet found in the body of the constable was fired from the pistol belonging to L. C. Leggett.

I

After the second indictment was presented by the grand jury, the defendant moved to quash the indictment upon the ground that there was a systematic discriminatory selection of the members of the grand jury. The attorneys for the State and defendant entered a stipula-

tion and offered testimony on this subject. It appears that since the former trial of this case, the Clerk of Forrest County has performed his duty as ordered by the Federal Court in that he has registered all colored persons who desired to vote. The record reveals that the Board of Supervisors has selected names for jury service without regard to race since the former trial of this case. The testimony reveals that since November 1965 nine Negroes have served on three grand juries in Forrest County; that Negroes have served upon petit juries in criminal cases; that a special venire of seventy-nine names summoned on the trial in the instant case contained fourteen Negroes. The trial judge overruled the motion to quash the indictment, and later overruled a motion to quash the petit jury. He took judicial notice that Negroes were not discriminated against in the selection of jurors.

On appeal to this Court, appellant complains that: (1) women were not required to serve on juries in Mississippi; (2) Negroes were systematically excluded from jury selection because, (a) they were being selected as they had been for many years, (b) that the Members of the Board of Supervisors did not select persons of "good intelligence, sound judgment, and fair character" as required by Mississippi Code Annotated section 1766 (1956) since they had selected persons they did not know; and (c) the State of Mississippi peremptorily challenged qualified colored persons left on the jury after the voir dire.

We are of the opinion that these contentions are not well-taken for the following reasons: (1) Women are not required to perform jury duty in Mississippi nor does the Federal Constitution require women to serve on juries in state courts. Mississippi Code Ann. § 1762 (1956); *State* v. *Hall*, 187 So. 2d 861 (Miss. 1966); *Pendergraft* v. *State*, 191 So. 2d 830 (Miss. 1966). (2) The evidence in this case shows that the Supervisors of Forrest County are

now selecting juries from the list of qualified voters of that county without regard to race or ethnic groups, and that the constitutional impediment of discriminatory jury selection for which this case was previously reversed has been removed. All qualified persons desiring to vote are now being registered by the Circuit Clerk of Forrest County, and from this list juries are now being drawn. (a) The argument that the juries are still being selected as they have been for many years is not well-taken, because the list from which the juries are now selected is a new list of qualified voters, including Negro citizens who have registered to vote. (b) We are of the opinion that Mississippi Code Annotated section 1766 (1956) in which the Board of Supervisors is directed to select "qualified persons of good intelligence, sound judgment, and fair character" is not a jurisdictional requirement, and although it is the duty of the Members of the Boards of Supervisors to select good citizens for jury service (*Black* v. *State,* 187 So. 2d 815, Miss. 1966), nevertheless, the jury laws of this State are directory and the selection of the jury list in an informal or irregular manner does not render it illegal. Miss. Code Ann. § 1798 (1952). The contention of appellant that the State of Mississippi, in the instant case, discriminated against Negroes by peremptorily challenging five Negroes, is not supported by the facts or by the law. The voir dire examination shows that most of the persons challenged by the State had been associated with the defendant. Moreover, the State is not required to accept jurors simply because they belong to the same ethnic group as the defendant. *Swain* v. *Alabama,* 380 U. S. 202, 85 Sup. Ct., 324 (1965); *Brown* v. *Allen,* 344 U. S. 443, 222 F. Supp. 10 (4th Cir. 1952).

Appendix A

II

The appellant contends that the attempted arrest of the appellant by Constable Humphrey was illegal because he was not a duly elected constable in District 3 and that when he began pursuit of defendant, no crime had been committed by him for which arrest should have been made. It is argued that deceased had a bad reputation for being a turbulent and violent person who arrested persons without probable cause, and for that reason the appellant had a right to resist an unlawful arrest and defend himself to the extent of taking the life of the deceased Constable Humphrey.

There is a list of cases heretofore decided by this Court in which we have held that a person may resist an unlawful arrest by such force as may be necessary, short of taking human life. Note 1. We are of the opinion that this line of authority is not applicable in the instant case because, under the facts here presented, the constable was attempting to make a legal arrest. Peace Officers and citizens may at any time arrest persons who are committing crimes in their presence, or to prevent a breach of the peace. Miss. Code Ann. § 2469 (1956). Moreover, the statutory law of this State expressly enjoins all constables "to keep and preserve the peace within his county". Miss. Code Ann. § 3887 (1956).

The defendant contends on appeal that at the time the constable began following him, he had committed no crime for which he could be lawfully arrested. Appellant cites the case of *Smith* v. *State*, 240 Miss. 738, 128 So. 2d 857 (1961) to support this contention. We are of the opinion that the *Smith* case is not authority here because the officer in that case had begun the pursuit of the defendant *before* the defendant had violated the traffic laws of the State. Whereas, in the instant case the constable did not begin pursuit of the defendant until *after* the

defendant had driven away at such a fast rate of speed his companions became alarmed for their safety. It is pointed out by *Blashfield* in his *Cyclopedia of Automobile Law and Practice*, Volume 8 (Perm. Ed.) section 5372, page 117, (1950), that reckless driving was a breach of the peace under the common law. Moreover, reckless driving is a misdemeanor under the statutory law of Mississippi. Miss. Code Ann. § 8175 (1956). See *Barnes* v. *State*, 249 Miss. 482, 162 So. 2d 865 (1964). We are of the opinion that the attempted arrest of the defendant, under the facts shown here, was not an illegal attempt to arrest him.

III

On the second trial, the defendant did not testify, but he sought to introduce certain witnesses to prove that the deceased constable had a bad reputation in the community for violence; that he had arrested some persons without probable cause and had pistol-whipped two of the proffered witnesses. The defendant also sought to show that Wilmer Kitchens, the regular Constable of Justice of the Peace District No. 3, worked with the deceased Humphrey and that as a team these two constables had a bad reputation for harassing colored citizens in and around beer taverns at Palmer's Crossing. The defendant offered to show that the deceased had drunk from a half-pint bottle of gin a short time before he was killed. The defendant also contends that he was not permitted to show that someone had threatened his life, and that bullets had been sent to defendant.

It will be observed that this testimony falls into seven distinct categories: (1) general reputation of deceased for violence; (2) reputation for unlawful arrests; (3) bad reputation of Constable Kitchens; (4) particular incidents of violence to others; (5) unlawful assault upon women by third

persons; (6) uncommunicated threats; and (7) deceased had drunk gin a short time before his death.

A minute examination of the proffered testimony has convinced us that the trial judge was correct in excluding this evidence, and for that reason we discuss each category of evidence separately (1 and 2). The testimony of certain witnesses as to the character of the deceased constable was properly excluded because this evidence was not admissible under the facts in this case. Ordinarily the character or reputation of the deceased person is not involved as part of the issue in a murder case, and proof relative thereto is generally inadmissible. It has often been pointed out that the violent, revengeful or bloodthirsty character of deceased cannot be shown as an excuse for a homicide because the unprovoked killing of a bad man is no less murder than the killing of the most peaceful and law-abiding person in the community. *Spivey* v. *State*, 58 Miss. 858 (1881); *Chase* v. *State*, 46 Miss. 683 (1872); *Jolly* v. *State*, 13 S. & M. 223 (Miss. 1849); *Dowling* v. *State*, 5 S. & M. 664 (Miss. 1846); 40 C. J. S. Homicide § 222 (1944).

There are exceptions to this general rule. The violent, dangerous and turbulent character of a deceased may be shown: (A) when, from the circumstances of the case, it is a part of the *res gestae*; (*King* v. *State*, 65 Miss. 576, 582, 5 So. 97—1888); (B) where the evidence of the homicide is wholly circumstantial (*Chase* v. *State, supra*); (C) where it is doubtful as to who the aggressor was at the time of the homicide (*Jolly* v. *State, supra; Cotton* v. *State*, 31 Miss. 504 (1856); or (D) where the immediate circumstances of the killing render it doubtful as to whether or not the act was justifiable. *Wesley* v. *State*, 37 Miss. 327, 346 (1859); *Chase* v. *State, supra.*

Before testimony of bad character of a deceased is admissible under one of the exceptions to the general rule,

the evidence must show that the issue of self-defense must at least be in doubt. *Spivey* v. *State, supra; Moriarty* v. *State,* 62 Miss. 654, 661 (1885); *Smith* v. *State,* 75 Miss. 542, 23 So. 260 (1898); *Anderson* v. *State,* 181 Miss. 300, 179 So. 560 (1938); *Wesley* v. *State, supra.* It is said in Wigmore on Evidence Volume 2 (3d Ed.) section 246, pages 44, 49-52 (1940) that:

> "Another and more specific form of limitation is the doctrine of 'overt act', peculiarly developed in Louisiana and Florida. The notion here is that the deceased's reputation can have a 'bona fide' bearing on the defendant's apprehension only where there occurs, at the time of the affray, some conduct of the deceased which might be otherwise colorless, but when interpreted by his known character becomes apparently an act of aggression. Thus there must be some 'overt act', *i.e.* of possible aggression before the reputation-evidence can be received. This is a wise and fair limitation, provided it be not further refined by details which generate into quibbles,—a proviso not always observed.
>
> "Two peculiar questions may arise under the overt-act form of the doctrine (1) Shall the question whether an overt act is sufficiently evidenced to lay the foundation for the reputation-evidence be *left entirely* in the hands of the *trial Court?* Unless our law is to become a mass of quibbles which no practitioner can master and every murderer will welcome, the answer must be in the affirmative. (2) May the defendant's mere unsworn assertion of an overt act (where permitted instead of his sworn testimony) be considered as in itself some evidence of an overt act? It certainly should be; but whether it is sufficient evidence for the trial court should never be considered on appeal."

Appendix A

The only evidence in the record indicative of an overt act toward the defendant by the constable was the testimony of Lewis Willie Smith. He testified that the constable came toward the automobile driven by the defendant, after it had gone out of control and into a ditch, with a flashlight and a gun in his hand. As against this testimony, Smith testified that the constable did not threaten the defendant, and James Anderson, the other passenger in defendant's automobile, testified that he did not see a gun in the hand of the constable, and that the constable did not threaten either of the parties at the time of the attempted arrest. The malice of the defendant was clearly shown by the statements he made after the homicide, that he had walked up to the constable after he fell and shot "the son-of-a-bitch" again in the head. Moreover, the defendant knew that the person asking him to disembark was an officer and that it was his duty to submit to the arrest. *Pickett* v. *State,* 139 Miss. 529, 104 So. 358 (1925); *Mullis* v. *State,* 27 S. E. 2d 91 (Ga. 1943). Defendant had no right to kill the officer merely because he was afraid of him, or was afraid he would arrest him "for nothing."

(3) The testimony that Constable Kitchens had a bad reputation for violence was not admissible as evidence in the murder case where Constable Humphrey was killed, since Kitchens was not present at the time of the homicide. 40 C. J. S. *Homicide* § 223 at 1143, § 274 at 1229 (1944).

(4 and 5) Testimony of antecedent specific acts of violence alleged to have been committed by deceased was not admissible to show bad character. *Newsome* v. *State,* 197 Miss. 797, 20 So. 2d 708 (1945). Details of a previous difficulty between the deceased and a third person prior to the homicide is inadmissible to show bad character of the deceased. 40 C. J. S. *Homicide* § 210 at 1119 (1944); *Rich* v. *State,* 124 Miss. 272, 86 So. 770 (1921); *McCoy* v. *State,*

91 Miss. 257, 44 So. 814, 815 (1907); The Chamberlayne *Trial Evidence* § 621 at 591 (1936); *Thompson* v. *State,* 84 Miss. 758, 36 So. 389 (1904); *Carter* v. *State,* 167 Miss. 331, 145 So. 739 (1933).

(6) The proffered testimony rejected by the trial judge and complained of here is the testimony of L. C. Leggett. He was asked: "Now there had been a time, had there not, when one of the men whom you know was at Lucy Wilborn's place had sent some bullets by you to Cloudies Shinall, is that right? . . . A. He gave me some bullets that was in the back of his car. Q. And what did he say? What was the message he sent? . . . Q. Did someone send bullets with you and say these were what he was going to get Clyde with . . . ?" This testimony was clearly incompetent. There is nothing in the evidence to show a threat, and if such a threat had been shown with reference to bullets, it was not shown to have been made by the deceased Humphrey. Moreover, uncommunicated threats are inadmissible in evidence until after it has been shown that the deceased did some *overt act* at the time of the homicide which would cause the slayer to believe that his life was in imminent danger. 26 Am. Jur. *Homicide,* §§ 363, 364 (1940); *Newcomb* v. *State,* 37 Miss. 383, 400 (1859); 40 C. J. S. *Homicide,* § 126 (3) at 1009, § 207 at 1113 (1944).

(7) The appellant complains that he was not permitted to show that the deceased had drunk intoxicating liquor a short time before the homicide for the purpose of showing the state of mind of the deceased at the time of the killing. There are times when it is proper to permit introduction of testimony to show the intoxicated condition of the deceased for the purpose of showing whether or not there was any present and pressing necessity for the defendant to take the life of the deceased to protect his own, or to prevent great bodily harm. *Byrd* v. *State,* 154 Miss. 742,

123 So. 867 (1929); *Jones* v. *State*, 227 Miss. 518, 86 So. 2d 348 (1956). On the other hand, evidence of the intoxication of the deceased is irrelevant where the testimony shows that the defendant was the aggressor, or there is no testimony evincing the necessity for the accused to kill the deceased. 40 C. J. S. *Homicide*, § 224 at 1144 (1944).

At the time defendant offered testimony to show that the deceased had imbibed intoxicating liquor, there was no evidence indicating a necessity on the part of defendant to kill the constable, and testimony that the officer had been drinking was inadmissible.

IV

The appellant argues that the totality of the proceedings in the case violates defendant's right to due process of law under the Fourteenth Amendment to the Constitution of the United States. On the contrary, there is very little excuse given by the defendant for killing the constable under the facts in this case. The testimony is abundant that the defendant not only shot the constable at a time when the officer was trying to arrest him, but that after the constable had fallen and was helpless, he exhibited his malice by going up to the prone body of the officer and shooting him in the back of the head. We are of the opinion that the testimony is more than sufficient to show that the defendant was guilty of murder.

V

The appellant complains that he was not given instruction Number Five, which provides that if the jury believed, among other things, that the deceased officer pointed a pistol at the defendant, and he was in fear that bodily harm would be inflicted upon him, or that he would be killed, then it

was the duty of the jury to find the defendant "not guilty." This instruction was properly refused because one does not have the right to kill another merely because he is afraid of him; nor may one kill another because he is afraid that he will receive some bodily harm. The law does not justify one's taking the life of a person in defense of his own person except where there are reasonable grounds to apprehend a design to commit a felony or do some great personal injury to the accused, and there shall be imminent danger of such design being accomplished. Miss. Code Ann., § 2218 (1956). Moreover, there was no testimony in the instant case that the officer pointed his gun at the accused.

Defendant's instructions Numbered 10, 11, 13, 14 and 17 refused by the court are subject to the same criticism as is made of instruction Number Five. Moreover, instructions as to the general reputation of the deceased were properly refused.

Instruction Number Twenty advises the jury that a constable has no jurisdiction to arrest a person beyond the confines of the district for which he was elected. This was error. As above pointed out, it is the duty of a constable to make arrest anywhere in the county for crimes committed in his presence (Miss. Code Ann., § 2467—1956), or to preserve the peace (Miss. Code Ann., § 3887—1956), and he may be fined for failure to perform his duties (Miss. Code Ann., § 3892—1956). The instruction was properly refused.

The manslaughter instruction, Number Twenty-four, refused by the court, is repetitious of instruction Number Twelve granted to the defendant; moreover, the phrase "then you must find for the defendant" is confusing.

The defendant complains that instruction Number Six for the State is erroneous and is reversible error. It is as follows:

> "The Court instructs the jury for the State that in order to justify a homicide on the plea of self de-

fense there must be something shown in the conduct of the deceased indicating a present intention to kill or do some great personal injury to the slayer, and imminent danger of such intention being accomplished; mere fears or beliefs are insufficient. The danger must be such as to lead a person reasonably to believe that the killing was necessary to prevent the deceased from killing him or doing to him some great bodily harm."

This instruction is based upon Mississippi Code Annotated, section 2218 (1956).

Our trial courts have been granting, and this Court has been sustaining, this instruction, or one of similar verbiage since the early days of our State's jurisprudence. In *Coleman* v. *State,* 22 So. 2d 410 (Miss. 1945), this Court said that a similar instruction had been approved since *Wesley* v. *State,* 37 Miss. 327 (1859). See: *Dobbs* v. *State,* 200 Miss. 595, 29 So. 2d 84 (1947); *Bailey* v. *State,* 174 Miss. 453, 165 So. 122 (1936); *Johnson* v. *State,* 140 Miss. 889, 105 So. 742 (1925); *Harris* v. *State,* 47 Miss. 318 (1872); *Bailey* v. *State,* 174 Miss. 453, 165 So. 122 (1936); *Head* v. *State,* 44 Miss. 731 (1871); *Ransom* v. *State,* 149 Miss. 262, 115 So. 208 (1928); *Kendrick* v. *State,* 55 Miss. 436 (1877). This identical instruction is held to be good in the case of *Holmes* v. *State,* 199 Miss. 137, 24 So. 2d 90 (1945).

The defendant obtained fifteen instructions, and the State obtained seven. The instructions for the defendant were liberal and we find no reversible error in the granting, or refusing, instructions in this case.

VI

The appellant complains that the trial court committed reversible error in permitting the pathologist, Dr. Cook, to testify that the powder burns on the flesh of the deceased

indicated that the gun was a short distance from the body when fired. We are of the opinion, however, that the testimony was properly admitted. King v. State, 251 Miss. 161, 168 So. 2d 637 (1964).

VII

The evidence with reference to the head wounds of the deceased was properly admitted, and corroborated the testimony of witnesses that, after the officer fell, accused shot him in the back of the head, and this goes directly to the issue of malice as an element in the charge of murder.

There are other alleged errors assigned, and although they were not argued, nevertheless, we have carefully examined these assignments of error, and we do not find error for which this case should be reversed.

We therefore affirm the judgment of the trial court and set June 30, 1967, as the day for the execution of the appellant Cloudies Shinall in the gas chamber, as required by law.

AFFIRMED.

ALL JUSTICES CONCUR.

Note 1: *Bergman* v. *State,* 160 Miss. 65, 133 So. 208 (1931); *Shedd* v. *State,* 203 Miss. 544, 33 So. 2d 816 (1948); *Williams* v. *State,* 120 Miss. 604, 82 So. 318, 84 So. 8 (1919); *Williams* v. *State,* 127 Miss. 851, 90 So. 705 (1922); *Fletcher* v. *State,* 129 Miss. 207, 91 So. 338 (1922); *Walker* v. *State,* 188 Miss. 177, 189 So. 804 (1939); *Cutrer* v. *State,* 43 So. 2d 385 (Miss. 1949); *Coleman* v. *State,* 218 Miss. 246, 67 So. 2d 304 (1953).

APPENDIX B

Excerpted Proffered Testimony of Sheriff Gray

(797) Q. My question which I was about to put to you was as follows: Did you ever receive complaints from the citizens of Palmers Crossing, notably, such people as Mary Jones, Bamer Madison or any other people down there about the conduct of Mr. Humphrey and Mr. Kitchens with respect to the work that was going on down there as so-called police work?

By Hon. James Finch: Let the record show that even in the absence of the jury we object to this and move that it be stricken, that question, from this record.

By the Court: Yes, I would sustain as to that question.

By Hon. James Finch: Thank you.

By Hon. Raymond A. Brown: If your Honor pleases, I thought that on an offer of proof you would record the objection and allow me to proceed.

By the Court: Well I'm going to let you proceed. He objected and I sustained it, but go ahead.

Q. Would you answer that question?

By the Court: Let the record show I sustain the objection to that question in the presence of the jury. (798) Now you may go ahead and develop your testimony.

By Hon. Raymond A. Brown: Yes, sir. But that question was out of the presence of the jury, Judge.

By the Court: Yes, I know. I sustained the objection to that question being asked in the presence of the jury.

Appendix B

By Hon. Raymond A. Brown: Thank, you, your Honor.

Q. Now Sheriff, is it not a fact that you received complaints from these citizens about the actions of these constables as law enforcement people in this area called Palmers Crossing? A. I have, a few.

Q. And is it not a fact that among the complaints that you received from this particular area, those from Bamer Madison and those from others, that they were complaints because of mistreatment of these people by these law enforcement officers in terms of assaults on women, beatings administered to men, and people arrested and brought in just for no real cause? In fact, you had to intervene from time to time, isn't that correct? A. I don't recall intervening, because a lot of times we get complaints from folks saying they're not drunk. In fact, about nine out of every ten you pick up they'll say they've only had two beers.

Q. Right. A. But I have had some complaints on that. Now I've picked up people myself who've complained and said they wasn't (799) drunk too.

Q. But you have never had anybody complain against you, I'll bet my life, that you tried to assault women or beat up anybody. Isn't that right? A. I don't recall any.

Q. I'd bet on it, that you have not. But I'd also ask you if it isn't a fact that with respect to these men, Kitchens and Humphrey as a team, that you have had such complaints made to you by people in terms of assaults on females? A. I probably,—I know of a couple, yeah.

Q. Now is it or is it not a fact that in your term of office where the Defendant was concerned that you received complaints with respect to mistreatment of him by Humphrey and Kitchens from time to time, this particular Defendant, Cloudies Shinall? A. No, not before the arrest.

Q. You have heard of them after the arrest? A. Yeah, just heard of it after the arrest.

Q. And you happen to be a very active officer who really knows that section, Palmers Crossing, and the individuals there, isn't that right? A. I know a few down there, yeah.

Q. In fact I think you know it very well indeed, and they know you. A. Well,—

Q. And these people have come to you for help in this particular regard, is that not right? A. They have, on several occasions, yeah.

Q. Yes; and even above and beyond that, as a result of this I believe you recommended the dismissal of Mr. Kitchens or the obtaining of his resignation as constable down there, isn't that right?

(800) By Hon. James Finch: Your Honor, we can't possibly see where this is—

By the Court: Well let him make his record. He's got a right to make a record.

By Hon. James Finch: Well let the record show that the State objects to it.

By the Court: Yes, all right.

Q. Isn't that correct, Sheriff Gray? A. I wouldn't necessarily say that, not actually, no.

Q. That's pretty close to true, isn't it? You wouldn't say everything I've said; but that's close to true, isn't it? A. Well to a certain extent, yeah.

Q. And the fact is that this man after this unfortunate tragedy to Mr. Humphrey did resign within a week or so, isn't that right? A. He did.

Q. And it was partly because of your investigation and of these complaints that he resigned, isn't that correct, Sheriff? A. It might have played a little part in it. I wouldn't say it carried the whole weight.

Q. No, no, I did not say that. I said partly because of your own investigation and these complaints. Is that right? A. I would say yes.

• • •

Appendix B

(1239) Mrs. Mildred Adams, introduced on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct examination by Hon. Raymond A. Brown:

Q. What is your name, Mrs. Adams? A. Mildred Adams.

Q. Where do you live, Mrs. Adams? A. Palmers Crossing.

Q. How long have you lived there? A. About four years.

Q. Did you know the deceased Mr. Humphrey? A. Yes, Sir.

Q. Did you have an experience with Mr. Humphrey that was communicated to the Defendant that dealt with a particular act?

By Hon. James Finch: Object to his leading the witness, Your Honor.

By the Court: Yes, don't lead her. She is your witness.

Q. Would you tell the Court with respect to any incident that involved you and the deceased Mr. Humphrey? A. Yes, Sir.

Q. Go ahead, and would you speak up, please?

By Hon. James Finch: To which we object, Your Honor, any incident that occurred between she and Mr. Humphrey, we object to that.

By the Court: Yes, I sustain as to that.

(1240) Would you tell us with respect to Mr. Humphrey what, if any experience you've had with Mr. Humphrey—

By Hon. James Finch: We just objected to that, Your Honor.

By the Court: Yes, I sustain.

Q. Did you ever have any experience with Mr. Humphrey in which an assault was committed on you?

By Hon. James Finch: Now Your Honor, we object.

By the Court: Yes, I sustain as to that.

Q. Well did you in Palmers Crossing have any incident which involved Mr. Humphrey in the year 1964?

By Hon. James K. Dukes: Your Honor, we object again for the same reason.

By the Court: I sustain.

By Hon. Raymond A. Brown: If Your Honor pleases, this goes to the state of mind of this Defendant in the community.

By the Court: That's all right. I sustain.

By Hon. Raymond A. Brown: In other words, as to his state of mind the objection is sustained.

By the Court: That's right.

By Hon. Raymond A. Brown: Then may we have an offer of (1241) proof? That's all I can do.

By the Court: Yes, let the jury go in the jury room.

(Here the jury was excluded.)

* * *

(1242) Q. Now, Mrs. Adams, you know the Defendant, right? A. Yes, Sir.

Q. And it is a fact that you told him and his mother about this incident that we're going to talk about, isn't that true? A. No, Sir.

Q. Who did you tell about it? A. That I told Shinall?

Q. Yes. A. No.

Q. Well who did you tell about it? A. Well I don't know. I told many people, they knew about it. I don't know who I told.

Q. You told many people in the community, is that right? A. And a lot of them heard it from other people.

Q. And what you mean is you did not directly tell Clyde Shinall? A. No.

Q. Did you tell Mrs. Shinall about it? A. Yes, I told her.

Q. And did you tell her about it at the time that that Defendant was living in her home as her son? A. No, Sir.

Q. When did you tell Mrs. Shinall about it? A. When they came to me and asked me about it.

Q. Now when did this happen? A. This happened in '63.

(1243) Q. In 1963? A. In 1963, I think it was.

Q. And did you testify to this in open court before this? A. Yes.

Q. And would you tell His Honor just what happened with respect to this incident in '63? A. Well we was at The Black Cat, we had pulled up there and parked and Mr. Kitchens and Mr. Cotton came up behind us.

Q. Now don't talk so fast. Talk slowly. Mr. Kitchens and Mr. Cotton,—you mean Cotton Humphrey? A. Yes, Sir.

Q. Came up behind you? A. Yes, Sir.

Q. Tell us slowly in detail so that the lady can get your testimony. A. Mr. Kitchens got out and went in The Black Cat. Mr. Cotton got out and came to the car where we were at. He opened the door on the side—

Q. Not so fast. Speak loudly and slowly, please, Madam.

By Hon. James Finch: May the record show even in the absence of the jury, Your Honor, be-

cause this testimony if permitted to go into this record might tend to and will be and is improper even for some other Court to consider and even in the absence of the jury, she's already said that it happened in 1963—

By Hon. Raymond A. Brown: That's right.

By Hon. James Finch: —which makes it very remote (1244) plus the fact that it was never communicated to the Defendant—

By Hon. Raymond A. Brown: She said not directly.

By Hon. James Finch: Would you let me finish please, Counsellor?

By Hon. Raymond A. Brown: Sure.

By the Court: Yes, I am going to rule that this would not be competent and it wouldn't be competent here in the absence of the jury because it was not conveyed to the Defendant Shinall.

By Hon. Raymond A. Brown: If Your Honor pleases, this bears on the issue of general reputation, and she said very precisely that everybody in the community or that many people in the community knew about it, and this is the only way that I can develop it in terms of reputation. Now whether or not another court will determine whether it is proper or not, I submit is up to the court. To say that an upper court should not even consider it—

By the Court: It has always been my policy in this court to let you make your record. So go ahead and ask your questions.

(1245) By Hon. Raymond A. Brown: That's all I'm asking for, Sir.

Q. Now, you've stated it happened in 1963, and you were about to tell us at the time of the objection what

actually happened. Would you go ahead, please? A. Mr. Cotton came up on the side I was sitting on and opened the door. He told me to get out. I got out and stood up side the car. He said you been drinking? I said yes, sir. He said you're drunk. I said no, sir. He said go get in the car. I said—

Q. Now, Madam, I only suggest to you one thing, to speak slowly and distinctly so that everyone can hear you. You are mumbling downward and it's lost. A. Well that's the way I talk. I can't help that.

Q. Talk to me, please. A. And he said go get in the car. I asked him why. He said don't ask me no questions, just get in the car. And I said I will if you tell me what you're arresting me for. Then he pushed me and I asked him not to push me, just to tell me what he was arresting me for.

* * *

(1247) Q. And what did he say to you? A. He said to get in the car and don't ask him no questions.

Q. And did you do that? A. No, I didn't.

Q. What did you do? A. I told him I'd get in there when he told me what he was arresting me for, and he kept pushing me, and I pushed him back and we got to fighting.

Q. And what happened? A. Well, Mr. Kitchens came out and he saw we was fighting out there in the road and he told a boy—

Q. What was Mr. Humphrey fighting with? What did he have in his hand? A. He had a blackjack in his hand.

Q. What did you have in your hands? A. Nothing.

Q. And what do you weigh? A. At that time I weighed about a hundred and twenty-eight.

Q. And Mr. Humphrey, as I understand, was about six feet tall and a substantial man. A. Yes, sir.

Q. So he had a blackjack and you, at a hundred and twenty-eight, had nothing. Right? A. That's right.

Q. Go ahead. A. And Mr. Kitchens come out of the Black Cat and he saw we was fighting, so he told O. D. to go out there and see if he couldn't stop us. So he come out there and told me to stop trying to fight against him and get in the car, and he put me in the car.

Q. He put you in the car? A. Yes, sir.

Q. What then happened? (1248) A. We went around to a place called Roger Lee's Place and he stopped the car and Mr. Kitchens got out and went in and Mr. Humphrey stayed in the car.

Q. Mr. Kitchens got out and Mr. Humphrey stayed in? A. That's right.

Q. All right, go ahead. A. And Mr. Kitchens brought some more mens out there and me and Mr. Humphrey was still having words, and so he said—

Q. Who said? A. Mr. Humphrey. When Mr. Kitchens got back in he said I know what we ought to do with her, we ought to carry her down here in these woods.

Q. Yes? A. I said yeah, I heard about that, you all carrying people to the woods, and I said if you carry me down there some of us ain't coming out.

Q. You had heard about people saying about they carried people to the woods? A. Yeah, they—

Q. What had you heard? A. I had heard that they arrested colored mens and carried them to the jail and carried the women to the woods when they wanted to.

By Hon. James Finch: Your Honor, we object to this going into this record—

By Hon. Raymond A. Brown: Well, this is what reputation is, your Honor. This is what reputation is, what one hears in the community.

By the Court: Well, go ahead. Make your record.

Appendix B

(1249) Q. All right now, with respect to what you had heard, who have you heard this from, about them carrying the men to jail and the women into the woods? A. I had heard it from different friends around there I'd be talking to. When something would happen like that we all being in the community we would talk about it.

Q. You were in communication? A. Yes, Sir.

Q. Now how often did these things happen that you heard about? Was it weekly, monthly, yearly, once in a while or what? A. It happened about two or three times a month.

Q. And who would be involved in these things? A. It would be Mr. Kitchens, Mr. Cotton, and a colored woman.

Q. Mr. Kitchens, Mr. Cotton and a colored woman? A. Uh-huh.

Q. The colored woman being taken into the woods, right? A. Yes, sir.

Q. All right. Now then, because you had heard these things when you got in the car what was your state of mind? A. That I didn't want to go to the woods with them.

Q. And then what happened? A. Well that's why I was resisting.

Q. Yeah. Well what happened after you got in the car? A. Well after Mr. Kitchens brought two or three more colored mens out there and put them in the car and me and Mr. Humphrey was still having words, when we got up to there, I don't know the street, it was where the Sears Roebuck Warehouse is or Sears Roebuck Store,—I just saw the Sears sign,—and he told Mr. Kitchens to stop the car, said if she don't shut her mouth I'm going to shut it for her, and he came back there and opened the door—

(1250) Q. Now this lady is having to write this down, so you must slow up and talk more distinctly. Go ahead now. A. And he came back there and opened the door

and pulled me out and started hitting me again with the blackjack and we started fighting and I bit him. He told Mr. Kitchens to come get this black so and so off of him, and Mr. Kitchens got out and he hit me right here. (Indicating)

Q. Well, speak up so that the record can show. Mr. Kitchens got out and what? A. He hit me right here side the nose with a pistol, and I wasn't but half unconscious. I was never unconscious,—

Q. All right, go ahead. A. But it weakened me and then they put me back in the car and tried to shut the door on me, and this other fellow that was in there he grabbed me and pulled me out of the way, and when we got to the jail they let the colored mens out and when I started to get out they told me to sit there, and after the colored mens got out then both of them got me and carried me in the jail, and Mr. Print Jones he was the jailer then and he—

Q. Mr. Print Jones was the jailer? A. Yes, sir.

Q. What did he do? A. He asked Mr. Cotton what happened to him, and he told him that I had did that to him. He said the black so and so, you ought to have killed her. And then they started beating me again there in the jail.

Q. Who? Not just they. Who? A. Cotton and Kitchens.

Q. All right. Now then what happened after that? A. Well I hollered and two colored trustees came down and got me.

(1251) Q. Yes? Go ahead. A. And before they got me as I started in the door Mr. Cotton pushed me and I fell on the concrete steps.

Q. Mr. Cotton Humphrey? A. Yeah.

Q. Go ahead, what happened then? A. The trusties took me upstairs and locked me up, and Mr. Cotton come

up there and stood on the door steps and told me if I didn't shut my mouth what he would do to me.

Q. Now was this the last experience you had with Mr. Humphrey or with Mr. Kitchens? A. Yes, sir.

Q. You had no other experience with them? A. No.

Q. Now for the record, do you know the reputation of Mr Humphrey in the community for peace and violence? Yes or no? A. Yes.

Q. You do? A. Yes.

Q. Now is that reputation in the community good or bad? A. It is bad.

Q. It is bad as far as you know. A. Yes.

By Hon. Raymond A. Brown: That is my offer of proof, your Honor.

By Hon. James Finch: To all of which we object.

By the Court: Yes, I sustain.

By Hon. Raymond A. Brown: The same arguments are repeated, (1252) your Honor, as heretofore made in support of the other offer as to Mrs. Shinall.

By the Court: Yes, all right.

(Witness excused.)

* * *

(1276) Mr. E. D. (Doll) Sullivan, introduced on behalf of the Defendant, after having been first duly sworn, testified as follows:

Direct examination by Hon. Raymond A. Brown:

Q. What is your full name, sir? A. E. D. Sullivan. They call me Doll Sullivan.

Q. You are known as Doll? A. That's right.

Q. D-o-l-l? A. That's right.

Q. Now Mr. Sullivan, where do you live? A. At Palmers Crossing.

Appendix B

Q. And how long have you lived in Palmers Crossing? A. Since forty-nine.

Q. And do you know the reputation of Constable Humphrey and Constable Kitchens in that particular community, their general reputations for peace and violence?

By Hon. James Finch: To which we object.

By the Court: Yes, sir, I sustain.

By Hon. Raymond A. Brown: Would you permit me to proceed, and then I'll make an offer of proof out of the presence of the jury as to reputation?

(1277) By the Court: Yes.

Q. Now, did you previous to March, 1965 have any specific experience with Mr. Humphrey and related to violence and arrest?

By Hon. James Finch: To which we object.

By the Court: Sustained.

By Hon. Raymond A. Brown: May I have an offer of proof?

By the Court: Yes, let the jury go in the jury room.

(Here the jury was excluded.)

Q. Now, Mr. Sullivan, you say you have lived in that community since 1949? A. Yes.

Q. By that community, I mean the Palmers Crossing area. A. Yes.

Q. Am I correct? A. Yes.

Q. Now since you have lived there since 1949, sir, have you come to know the general reputation of Constable Humphrey for peace and violence in the community?

Appendix B

By the Court: Answer yes or no.

A. Yes.

Q. Now would you tell the Court exactly what—

By the Court: You can ask him now—

(1278) By Hon. Raymond A. Brown: I am going to ask him now what it is, Sir.

By the Court: He has said he knows the reputation, and the question now is, is it good or bad.

Q. Is that reputation good or bad? A. Bad.

Q. Now, you base this not only on your own personal experience but on information and from what you have heard from others in the community? You base it on your personal experience and from what you've heard from others, is that right? A. On myself and others.

Q: And others. Now, Mr. Doll Sullivan, was there an occasion in the quarters or in the Palmers Crossing section when you were arrested by Mr. Humphery? A. Yes, Sir.

Q. Now, where were you at the time that he arrested you? A. I was about a hundred and fifty feet from my front door.

Q. About a hundred and fifty feet from your front door, is that right? A. Yes, Sir, on my way to the house.

Q. You were on your way home? A. Yes, Sir.

By the Court: Can you qualify when this was?

Q. When was this? Was this before March of 1965, before the Humphrey killing? A. It was before.

Q. All right. Now about what year, going back from the (1279) Humphrey incident, how long back? Was it in 1965?

By Hon. James Finch: Object to his leading, Judge.

By the Court: Yes, don't lead him. Let him tell if he knows.

A. It was in sixty-four.

Q. All right. Now with respect to this, would you go ahead and tell us just what happened? A. I had been up on the hill in a room, a house rather, because Mr. Hudson was going to move the house we was living in, so I was on my way back to the house and just as I got near the house well Mr. Kitchens drove up side of me and I didn't even look back, didn't know who it was, and Mr. Cotton jumped out of the car and—

Q. Who is Mr. Cotton? A. Cotton Humphrey jumped out of the car and commenced beating me. Well Mr. Kitchens—

Q. What did he beat you with? A. A club.

Q. Where were you struck? A. On the head.

Q. And how often were you struck? A. I don't know how many times because Mr. Kitchens, he jumped out of the car and run around the car and struck me.

Q. Struck you with what? A. A pistol.

Q. A what? A. With a pistol and handcuffed me.

Q. So did you ask them what you were being arrested for? A. I didn't have time. They throwed me up in the car and Mr. Cotton, he said I ought to kill you. So I told them to (1280) pull the handcuffs off of me. Well Mr. Kitchens drove on up to the jail house with me. Well Mr. Cotton, on the way up here, he struck me a couple of more times in the face.

Q. What happened at the jail? A. Well, they locked me up. On Monday Morning they—

Q. Did you require any special medicine at the jail? A. They wouldn't give me none.

Q. Well I'm asking you, did you require any? A. Yes, Sir, I did.

Q. Well, why did you require any special medicine? A. Because I was hurting, and any time I gets hit on

the head or something like that I takes the headache, and I have to take medicine for a headache practically all the time, and if I'm struck on the head like that it's worse. Well, I asked for medicine but I didn't get it.

Q. Did you ask these two men, Humphrey and Kitchens? A. I asked the jailer, Mr. Print Jones.

Q. Now after this were you released from jail? A. Not at that particular time.

Q. Well when were you finally released from jail? A. After I went and served time on the county road.

Q. Now, did you see Mr. Humphrey and Mr. Kitchens together regularly in the Palmers Crossing section? A. Pretty regular.

Q. Would they be together or separate? A. Together most of the time.

Q. Now how often would you say you have seen these men riding together in the car? A. Practically every weekend, because I'd never hardly be out only on the weekend.

Q. Now, what have you heard concerning their reputations? You said you knew their reputations. What was it that (1281) you heard these men did on weekends or during the week where people were concerned?

By Hon. James Finch: To which we object even in the absence of the jury.

By the Court: Yes, I would sustain as to that.

By Hon. Raymond A. Brown: If Your Honor pleases, may I press it as that which formed the reputations.

By Hon. James Finch: Now Your Honor—

By the Court: He's already testified that he knew his general reputation and that that reputation was bad.

By Hon. Raymond A. Brown: These would be specifics that would support his knowledge of the reputation.

By Hon. James Finch: Your Honor, you can never go into specifics in the determination of this.

By the Court: I sustain.

By Hon. Raymond A. Brown: That is my offer of proof, Your Honor.

By Hon. James Finch: To which we object.

By Hon. Raymond A. Brown: And I press it, of course, on (1282) the same grounds that it shows state of mind and reputation of the deceased.

By Hon. James Finch: We object.

By the Court: I sustain. Bring the jury back.

(Witness excused.)

* * *

APPENDIX C

Pertinent Sections of Miss. Code Ann. 1962 Regarding Juror Selection

§ 1762. Who are competent jurors.

Every male citizen not under the age of twenty-one (21) years, who is either a qualified elector, or a resident freeholder of the county for more than one year, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five (5) years and who is not a common gambler or habitual drunkard, is a competent juror; but no person who is or has been within twelve (12) months the overseer of a public road or road contractor shall be competent to serve as a grand juror. But the lack of any such qualifications on the part of one or more jurors shall not vitiate an indictment or verdict. However, be it further provided that no talesman or tales juror shall be qualified who has served as such tales juror or talesman in the last preceding two (2) years; and no juror shall serve on any jury who has served as such for the last preceding two (2) years; and no juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.

§ 1762-01. Resident freeholders not qualified electors—competent jurors by court order.

Whenever any judge of the circuit court of any circuit court district determines in his discretion that persons who are then, and have been for more than one (1) year previously thereto, a resident freeholder of any county in his district though not a qualified elector of that county, should be made and constituted a person qualified to serve as a competent juror of the county of that person's residence, but who is otherwise qualified, the said circuit judge is authorized to make and enter an order in term time or in vacation, upon

the minutes of the circuit court of such county to that effect and thereupon all persons in that county who are and have been such a resident freeholder shall thereupon be qualified, in accord with the terms of this act, to serve upon any jury in that county. Said order shall remain in full force and effect until terminated by an order of the judge of the circuit court district in which said county is situated, to be entered upon the minutes of the circuit court in that county in term time or vacation.

§ 1762-02. Who are competent jurors—after entry of court order.

Upon the entry of the aforesaid order by said circuit judge of the circuit court, and until its termination by an order made under Section 1 [§ 1762-01] hereof, supra, every male citizen not under the age of twenty-one (21) years, who is either a qualified elector, or who is and has been a resident freeholder of the county for more than one (1) year, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five (5) years and who is not a common gambler or habitual drunkard, is a competent juror; but no person who is or has been within twelve (12) months the overseer of a public road or road contractor shall be competent to serve as a grand juror. But the lack of any such qualifications on the part of one or more jurors shall not vitiate an indictment or verdict. However, be it further provided that no talesman or tales juror shall be qualified who has served as such tales juror or talesman in the last preceding two (2) years; and no juror shall serve on any jury who has served as such for the last preceding two (2) years; and no juror shall serve who has a case of his own pending in that court, provided that there are sufficient qualified jurors in the district, and for trial at that term.

Appendix C

§ 1762-03. How lists of jurors procured.

As long as an order provided for by Section 1 [§ 1761-01] supra, is in force and effect, the board of supervisors at the April meeting in each year, or at a subsequent meeting if not done at the April meeting, shall select and make a list of persons to serve as jurors in the circuit court for the twelve (12) months beginning more than thirty (30) days afterwards, and as a guide in making the list they shall use the registration book of voters and the land assessment roll of the county, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them as nearly as they conveniently can, from the several supervisors districts in proportion to the number of qualified persons in each, excluding all who have served on the regular panel within two (2) years, if there be not a deficiency of jurors. The clerk of the circuit court shall put the names from each supervisors district in a separate box or compartment, kept for that purpose, which shall be locked and closed and sealed, except when juries are drawn, when the names shall be drawn from each box in regular order until a sufficient number is drawn. The board of supervisors shall cause the jury box to be emptied of all names therein, and the same to be refilled from the jury list as made by them at said meeting. If the jury box shall at any time be so exhausted of names as that a jury cannot be drawn as provided by law, then the board of supervisors may at regular meeting make a new list of jurors in the manner herein provided.

In order that the board of supervisors may properly perform the duties required of it by this section, it is hereby made the duty of the circuit clerk of the county and the registrar of the voters to certify to the board of supervisors during the month of March of each year under the seal of his office the number of qualified electors in each of the several supervisors districts in the county.

If and when the above order of the district judge is terminated, then thereafter the land assessment roll of the county shall not be used or referred to in making a list of persons to serve as jurors in the said circuit court.

§ 1762-04. When act becomes operative—conditions.

The authority conferred by the terms of Sections 1, 2 and 3 [§§ 1762-01, 1762-02, 1762-03], supra, shall be exercised only on and after any date when persons who are and have been resident freeholders of a county for more than one (1) year are eliminated by amendment or otherwise as qualified or competent jurors under the provisions of Section 1, Chapter 308, Mississippi Laws of 1962, being Section 1762, Mississippi Code of 1942, Recompiled, and Section 2 of said Chapter 308, Mississippi Laws of 1962, being Section 1766, Mississippi Code of 1942, Recompiled.

• • •

§ 1766. How lists of jurors procured.

The board of supervisors at the April meeting in each year, or at a subsequent meeting if not done at the April meeting, shall select and make a list of persons to serve as jurors in the circuit court for the twelve (12) months beginning more than thirty (30) days afterwards, and as a guide in making the list they shall use the registration book of voters and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them, as nearly as they conveniently can, from the several supervisors districts in proportion to the number of qualified persons in each, excluding all who have served on the regular panel within two (2) years, if there be not a deficiency of jurors. The clerk of the circuit court shall put the names from each supervisors district in a separate box or compartment, kept for the purpose, which shall be locked and kept closed and sealed, except when juries are drawn, when the names shall be drawn

from each box in regular order until a sufficient number is drawn. The board of supervisors shall cause the jury box to be emptied of all names therein, and the same to be refilled from the jury list as made by them at said meeting. If the jury box shall, at any time, be so exhausted of names as that a jury cannot be drawn as provided by law, then the board of supervisors may at any regular meeting make a new list of jurors in the manner herein provided.

In order that the board of supervisors may properly perform the duties required of it by this section, it is hereby made the duty of the circuit clerk of the county and the registrar of the voters to certify to the board of supervisors during the month of March of each year under the seal of his office the number of qualified electors in each of the several supervisors districts in the county.

§ 1768. List certified to circuit court.

A certified copy of the lists shall be immediately delivered by the clerk of the board of supervisors to the clerk of the circuit court, and shall be by him carefully filed and preserved as a record of his office; and any alteration thereof shall be treated and punished as provided in case of the alteration of a record.

§ 1769. Names of jurors not serving returned to box.

The slips containing the names of jurors drawn for any regular or special term shall be safely kept by the clerk until the sitting of the court at such term, and the names of such persons as shall fail to appear, or shall be excused by the court, or not required to serve in consequence of the failure of the term, or other cause, shall be returned to the box.

§ 1771. List of jurors not serving.

After the expiration of the twelve months for which any juror list is made, the clerk thereof shall make a list of

the names of all persons named in the list who did not serve as jurors for the week or as retained talesmen during the year on which the jury list was made, and shall deliver the list, duly certified, to the clerk of the board of supervisors before its first meeting in the next year; and those names shall constitute a part of the list of jurors for the ensuing twelve months, unless the board of supervisors shall, for reasons deemed good, cause some of said names to be omitted from the list.

§ 1772. How grand and petit jurors drawn.

At each regular term of the Circuit Court, and at a special term if necessary, the Judge shall draw, in open court, from the five (5) small boxes enclosed in the jury box, slips containing the names of sixty-two (62) jurors to serve as grand and petit jurors for the first week and thirty-six (36) to serve as petit jurors for each subsequent week of the next succeeding term of the court, drawing the same number of slips from each and every one of the five (5) small boxes if practicable, and he shall make and carefully preserve separate lists of the names, and shall not disclose the name of any juror so drawn; but only thirty-six names shall be drawn for each week or any term where a grand jury is not to be drawn. But, should it appear to the Judge that the above number of jurors will be insufficient for that particular term, the Judge may draw slips containing the names of up to eighty (80) jurors to serve as grand and petit jurors for the first week, and up to sixty (60) jurors to serve as petit jurors for any subsequent week or weeks of the term, such slips containing the names of jurors to be drawn in the manner as hereinabove provided. The slips containing the names so drawn shall be placed by the Judge in envelopes, a separate one for each week, and he shall securely seal and deliver them to the Clerk of the court, so marked as to

indicate which contains the names of the jurors for the first and each subsequent week. If in drawing it appears that any juror drawn has died, removed or ceased to be qualified or liable to serve as a juror, the Judge shall cause the slip containing the name to be destroyed, the name to be stricken from the jury list, and he shall draw another name to complete the required number.

§ 1773. Envelopes opened and venire issued.

The clerk shall safely keep the envelopes, without opening, until within fifteen days of the term for which the jurors were drawn, and shall then, in the presence of the sheriff and clerk of the chancery court, open the envelopes and make a list of the names in each. Each list shall be certified by those officers to be correct, and on each they shall certify whether the envelope containing the names appeared to have been opened or disfigured. The several lists of jurors, with the certificates, shall be copied into the minutes of the first day of court. After making and certifying the lists, the clerk of the circuit court shall forthwith issue and deliver to the sheriff separate venire facias for the jurors for each week, returnable on the proper day.

* * *

§ 1779. Grand jurors—how drawn.

The number of grand jurors shall not be less than fifteen nor more than twenty, in the discretion of the court; and they shall be drawn from the list of persons in attendance as jurors, in the following manner: The name of each juror shall be written on a separate slip of paper, and the name from each supervisor's district shall be placed in a separate box, hat or compartment, in open court, and there shall be drawn out, by a person designated by the judge, the number directed by the court; and said

names shall be drawn from each box in regular order until the number designated is drawn, and the jurors whose names are so drawn shall constitute the grand jury, and be impaneled and sworn as such. And the court shall poll the jury to ascertain whether any juror is directly or indirectly interested in the illicit sale of vinous, malt or spiritous liquors.

* * * *

§ 1792. How petit juries impaneled.

After the drawing of the grand jury, the remaining jurors in attendance shall be impaneled into three petit juries for the first week of court if there be a sufficient number left, and, if not, the court may direct a sufficient number for that purpose to be drawn and summoned; but if there be more than enough jurors for the three juries, or for two juries if the court shall direct only two to be impaneled, the excess may be discharged, or they may be retained, in the discretion of the court, to serve as talesmen; and, if so retained, they shall have the privilege of members of the regular panel, of exemption from service.

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NO. 708

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

CLOUDIES SHINALL ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported in 199 So. 2d 251 and is attached hereto as Appendix "A".

JURISDICTION

This Court has jurisdiction under the provisions of Section 1257(3), Title 28, U. S. C.

QUESTIONS PRESENTED

I.

THE RIGHTS OF THE PETITIONER UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE NOT VIOLATED BY THE STATE OF MISSISSIPPI IN HIS

TRIAL IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI NOR BY THE AFFIRMANCE OF THAT CONVICTION BY THE MISSISSIPPI SUPREME COURT.

II.

THE GRAND AND PETIT JURIES WHICH INDICTED, TRIED AND CONVICTED THE PETITIONER WERE CONSTITUTIONALLY CONSTITUTED AND THEIR SELECTION DID NOT VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATUTES INVOLVED

MISSISSIPPI CODE ANNOTATED 1942

§ 2215. Homicide, murder, defined.

The killing of a human being, without the authority of law, by any means or in any manner, shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of any act eminently dangerous to others, and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, arson or robbery, or in any attempt to commit such felonies.

§ 2218(f)

Homicide—justifiable homicide: The killing of a human being by the act, procurement or omission of another shall be justifiable in the following cases: . . .

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or do some great personal injury, and there shall be imminent danger of such design being accomplished.

§ 2225. Homicide—killing unnecessarily, while resisting effort of slain to commit felony or do unlawful act.

Every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter.

STATEMENT OF THE CASE

The petitioner was convicted of the murder of Frederick L. Humphrey, a law enforcement officer of Forrest County, Mississippi on March 26, 1965 in a neighborhood known as Palmer's Crossing. On the day of the homicide the petitioner borrowed an automobile from a friend, L. C. Leggett, for the purpose of going to get his pay check. On this trip he was accompanied by two friends and on returning from their mission, they visited several taverns and consumed a large quantity of beer. During the afternoon, one of the passengers in the automobile with the petitioner found a .22 caliber pistol, holster and belt under the front seat of the automobile and strapped it on his person and walked into one of

the beer taverns so armed. Before the officers arrived at the tavern this person gave the pistol to the proprietress and after the officers left she returned the pistol to the petitioner.

The petitioner and his companions then went from one beer tavern to another until a short time after dark. They were then parked in front of a beer tavern known as the Heat Wave and as they started to drive away the car quit running in a place where there was a ditch across the road. While the petitioner was attempting to restart the car, Constable Humphrey came from the Heat Wave and directed his flashlight toward the car, whereupon the petitioner drove off at such a rapid rate of speed that his companions became alarmed and feared for their safety. They begged the petitioner to slow his speed as they were afraid he would wreck the car and kill them all.

Constable Humphrey in the meantime got into an automobile belonging to another law enforcement officer and began to follow the automobile driven by the petitioner. The petitioner drove at such a high rate of speed that he could not traverse a curve in the road and his automobile went out of control, running into the driveway of a residence and into a wire fence.

Constable Humphrey came up behind the automobile driven by the petitioner, stopped his car, got out, left the lights burning, and approached the automobile driven by petitioner. One witness said the officer had a flashlight in his hand and another witness said he also had a pistol in his hand. The petitioner and the passengers were directed by the officer to get out of the car and when the passengers alighted the officer looked into the front seat where the petitioner was sitting. At this time a gun fired. One witness testified that he saw the flash

of the gun and another witness testified that the petitioner shot the officer. The two passengers ran from the scene and stated that after they had gone some distance they heard two more pistol shots.

Later that night, the petitioner told one of his companions that after they fled, he walked up to Humphrey and shot "the son of a bitch in the head." He later told L. C. Leggett, owner of the automobile, that he killed "the son of a bitch", naming Humphrey, with Leggett's pistol. The pistol was later recovered from Leggett. The pistol was mailed to the F. B. I. Criminal Laboratory, together with a bullet found in the body of the deceased by the coroner and upon examination, it was discovered that the bullet matched the other bullets fired from the pistol of L. C. Leggett.

ARGUMENT

I.

THE RIGHTS OF THE PETITIONER UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE NOT VIOLATED BY THE STATE OF MISSISSIPPI IN HIS TRIAL IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI NOR BY THE AFFIRMANCE OF THAT CONVICTION BY THE MISSISSIPPI SUPREME COURT.

Petitioner contends that the State of Mississippi denied him the right to defend himself in the trial court and that the denial of this right constitutes a deprivation of due process of law. If there has ever been a case in which a defendant was granted "a fair and impartial hearing" on the criminal charge in the State of Mississippi, this was the case. This case was appealed twice

to the Mississippi Supreme Court. On the first appeal (Shinall v. State, Miss., 187 So. 2d 840) the Mississippi Supreme Court reversed and remanded the case because of an apparent racial discrimination in the selection of the grand and petit juries. He was again tried and convicted of murder and was sentenced to the death penalty. This petitioner was represented by extremely able counsel both during the trials on the merits of the case and on appeal. The record of the second trial consists of some eight volumes and nearly half of this entire record was concerned with the voir dire examination of prospective trial jurors. The petitioner argues that he was deprived of his right to present facts which would enable him to establish self-defense. This argument is predicated upon the exclusion of the evidence by several witnesses who testified in an effort to establish the reputation of both Constable Humphrey and Constable Kitchens for violence.

The trial court was eminently correct in excluding this testimony under Mississippi law. Ordinarily the character or reputation of the deceased person is not involved as part of the issue in a murder case and proof relative thereto is generally inadmissible. *Spivey v. State,* 58 Miss. 858, (1881); *Chase v. State,* 46 Miss. 683, (1872); *Jolly v. State,* 13 Smedes & M. 223, (Miss. 1849); *Dowling v. State,* 5 Smedes & M. 664, (Miss. 1846); 40 C.J.S. Homicide, Section 222 (1944).

The petitioner relies heavily on the recent case from this Court of *Washington v. Texas,* — U. S. —, 18 L. Ed. 2d 1019, 35 L. W. 4675 (June 12, 1967). Counsel for the appellee offers no argument as to the holding of that case but, on the contrary, would state that it announces sound law as a deprivation of due process of law under the Fourteenth Amendment to the United

States Constitution. This case, however, is not applicable to the instant case since it held that the State of Texas arbitrarily denied the defendant the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The defense testimony in that case was inadmissible as a matter of procedural law and this certainly constituted a denial of due process. The State of Mississippi has no such law and the action of the trial court in excluding the testimony was based on valid state evidentiary law.

The petitioner contends that the homicide occurred as a result of self-defense and that he had reason to apprehend a design of some great injury to himself. The facts of the case, including the testimony of his own witnesses, completely refute this assertion. The Mississippi Supreme Court found in *Shinall v. State*, 199 So. 2d 251, that:

> "The only evidence in the record indicative of an overt act toward the defendant by the constable was the testimony of Louis Willie Smith. He testified that the constable came toward the automobile driven by the defendant, after it had gone out of control and into a ditch, with a flashlight and a gun in his hand. As against this testimony, Smith testified that the constable did not threaten the defendant, and James Anderson, the other passenger in defendant's automobile, testified that he did not see a gun in the hand of the constable, and that the constable did not threaten either of the parties at the time of the attempted arrest. The malice of the defendant was clearly shown by the statements he made after the homicide, that he had walked up to the constable after he fell and

shot 'the son of a bitch' again in the head. Moreover, the defendant knew that the person asking him to disembark was an officer and that it was his duty to submit to the arrest."

There was no question in the instant case as to who was the aggressor nor was self-defense pleaded. There is no merit in the argument that petitioner was denied the right to defend himself and the cases cited by the petitioner are no authority for this contention.

Although the petitioner failed to raise this as a question for review on certiorari, he complains of the lack of probable cause for his arrest on the day of the homicide. The record clearly shows that the law enforcement officer did not begin his pursuit of the petitioner until after he had driven away at such a fast rate of speed that his companions became alarmed for their safety.

"Peace officers and citizens may at any time arrest persons who are committing crimes in their presence, or to prevent a breach of the peace. Mississippi Code Ann. Section 2469 (1956). Moreover, the statutory law of this state expressly enjoins all constables 'to keep and preserve the peace within his county'. Mississippi Code Ann. Section 3887 (1956). . . . It is pointed out by Blashfield in his Cyclopedia of Automobile Law and Practice, Volume 8, (Perm. Ed.) Section 5372, page 117, (1950) that reckless driving was a breach of the peace under the common law. Moreover, reckless driving is a misdemeanor under the statutory law of Mississippi. Miss. Code Ann., Section 8175 (1956). See Barnes v. State, 249 Miss. 482, 162 So. 2d 865 (1964). We are of the opinion that the attempted arrest of the defendant, under the facts shown here, was not an illegal attempt to arrest him." Shinall v. State, supra.

II.

THE GRAND AND PETIT JURIES WHICH INDICTED, TRIED AND CONVICTED THE PETITIONER WERE CONSTITUTIONALLY CONSTITUTED AND THEIR SELECTION DID NOT VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioner next attacks the jury selection system of the State of Mississippi and contends that the system violates the equal protection and due process clauses of the Fourteenth Amendment.

On the first appeal, *Shinall v. State,* — Miss. —, 187 So. 2d 840, the Mississippi Supreme Court reversed, quashed the indictment and remanded the cause with the petitioner to be held for action by a subsequent grand jury. This reversal was predicated upon the fact that the Circuit Clerk of Forrest County, Mississippi, Theron Lynd, was under a federal court injunction for discriminating against Negroes in their attempts to register and to be placed upon the list of qualified registered voters. Mr. Lynd had been in office since 1959 and the injunction was in force at the time of the trial. The Court of Appeals for the Fifth Circuit in *United States v. Lynd,* 349 F. 2d 791, (5th Cir. 1965) found the registrar, Lynd, guilty of contempt for failure to obey orders of the court regarding discrimination and provided how he might purge himself. By the opinion rendered therein, the registrar was directed and ordered to register approximately two hundred and eighty Negro applicants, subject to certain possible deletions.

The Mississippi Supreme Court in the first opinion said:

"Under our statute, Mississippi Code Ann., Section 1766 (Supp. 1964), it was the duty of the supervisors to prepare their jury lists at the April meeting each year, which we presume they did. The last named cases were both decided on June 16, 1965, after the jury lists had been made. Appellant was indicted and tried at the July 1965 term. Proof was lacking that the people ordered by the Fifth Circuit to be registered had been registered or that the jury list had been made after such additional registration. So, here, we have a judicial finding that at the time of the making of the jury list for this term—at the time of the drawing of the grand jury and the petit venires, there were actually members of the Negro race who had been denied registration solely on account of race. This denial was by the State acting through its duly elected, qualified and acting administrative officer, to-wit: the registrar of Forrest County."

The situation that existed in Forrest County, Mississippi insofar as registration and selection of jurors before and at the time of the first trial no longer existed at the time of the second trial. The second trial of the petitioner occurred one year later. The Circuit Clerk purged himself of contempt a year before this trial and no discrimination as to registration or in the selection of jurors existed at that time in Forrest County, Mississippi. Petitioner, in his appellate brief to the Mississippi Supreme Court, after the second trial, admitted that since November 1965 that nine Negroes had served on three grand juries in Forrest County, Mississippi; that two local attorneys recalled five criminal trials in which Negroes served as petit jurors and that the special venire summoned for the second trial included

seventy-nine names of which fourteen were Negroes and thirty-five were white.

Counsel for Respondent would not like to include in this brief a portion of the brief filed on behalf of the appellee, State of Mississippi, in the Mississippi Supreme Court after the second trial:

> "Appellee would submit that it is very difficult to understand what would satisfy the appellant as to equal protection and due process of law. On his first appeal he complained about systematic exclusion of Negroes on the grand and petit venires and this Court decided this assignment of error in his favor and reversed and remanded the cause. On his second trial, after fourteen Negroes were selected on the special venire, he complains that the State used five of its peremptory challenges to eliminate Negroes on the trial jury. That issue was laid to rest in Swain v. Alabama, 380 U. S. 202, 85 S. Ct. 824 (1965), when the United States Supreme Court held that the use of peremptory challenges to exclude Negro jurors did not constitute a denial of equal protection. It is admitted by the appellee that the court further held that while it presumed the peremptory challenges are used to obtain a fair and impartial jury, that presumption is rebuttable. Where in this record is there any evidence adduced on behalf of the appellant which would show that the State of Mississippi used these challenges to effectuate discrimination on the basis of race? After making this argument as to the State's use of peremptory challenges, the brief of the appellant (page 31) states:
>
> 'Appellant does not contend that he is entitled to a jury containing members of his race; . . .'

"The next paragraph in the brief of the appellant following the above quotation states:

'In the only capital case in which a Negro has been allowed to sit as a juror in Forrest County both the defendant and victims were Negroes.'

"The only possible answer to that statement is, So, what.

"Appellee would respectfully submit that if this form of nonsensical legal reasoning should be followed the result would be that a member of the Negro race could never be tried nor convicted of a criminal offense in the courts of the State of Mississippi."

As recently as July 31, 1967, the United States Court of Appeals for the Fifth Circuit addressing itself to this question in *Bass v. State of Mississippi,* No. 24,029 (5th Cir.) stated as follows:

"There is, first, nothing in the voter registration statutes, even if assumed to be unconstitutional, which denies to the Mississippi courts the power to inquire into whether the jury under scrutiny was subject to the vice of unconstitutional racial exclusion, whether attributed to the deficiencies in the voter registration rolls or from other causes. To the contrary, the action of the Supreme Court of Mississippi in this very case demonstrates that that court has and will vindicate the federally guaranteed right of constitutionally selected juries. And as they had done just previously in Harper v. State, (1965) 251 Miss. 699, 171 So. 2d 129, the existence of the voter registration laws did not handicap the Supreme Court of Mississippi either in reaching the result of reversal in a spectacular capital case or in delivering the admonition to the Mississippi trial courts and prosecuting officers in

these strong terms. 'Our courts and officials charged with the duty of selecting jurors should heed these laws, if we hope to continue to handle violations of our laws. Our courts, whenever facts such as these are shown, can do nothing except reverse.' 182 So. 2d 591, 595. If the record either made or to be made in the state trial court proves the truth of the charge that even though five Negroes were on the grand jury which reindicted Bass, it came from a larger list which was constitutionally infected, Davis v. Davis, 5 Cir. 1966, 361 F. 2d 770, 775 (en banc), the 'firm prediction' — U.S. —, —, —, [16 L. Ed. 2d 925, at 938 and 940] is not that the equal civil rights will be denied or unenforced. To the contrary, the Mississippi court will, as it has before, vindicate that right without equivocation."

The petitioner, in contesting the Mississippi statute which excludes women from jury service, is strictly "beating a dead horse." Women are not required to perform jury duty in Mississippi nor does the Federal Constitution require women to serve on juries in State Courts. *Mississippi Code Ann.*, Section 1762 (1956); *State v. Hall,* (Miss.) 187 So. 2d 861 (1966); *Pendergraft v. State,* 191 So. 2d 830, (Miss. 1966). This argument was finally foreclosed in *Hoyt v. Florida,* 368 U. S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159, wherein this Court stated:

"We address ourselves first to appellant's challenge to the statute on its face. Several observations should initially be made. We, of course, recognize that the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color, but also other exclusions which 'single out' any class of persons 'for different treatment not based on some reasonable classification.' Hernandez v. Texas,

347 U. S. 475, 478, 98 L. Ed. 866, 870, 74 S. Ct. 667. We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this court's dictum in Strauder v. West Virginia, 100 U. S. 303, 310, 25 L. Ed. 664, 666, to the effect that a state may constitutionally 'confine' jury duty 'to males'. This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the court, see Fay v. N. Y., supra, (332 U. S. at 289, 290), and had been reflected, until 1957, in congressional policy respecting jury service in the federal courts themselves. Even were it to be assumed that this question is still open to debate, the present case tenders narrower issues."

This case also decided the question as to the disproportion of women to men on jury lists when it further held that:

"Finally, the disproportionment of women to men on the list independently carries no constitutional significance. In the administration of the jury laws proportional class representation is not a constitutionally required factor. See Akins v. Texas, 325 U. S. 398, 403, 89 L. Ed. 1692, 1696, 65 S. Ct. 1276; Cassell v. Texas, 339 U. S. 282, 286, 287, 94 L. Ed. 839, 846, 847, 70 S. Ct. 629; Fay v. New York, supra (332 U. S. at 290, 291)."

The Court of Appeals for the Fifth Circuit in *Bass v. State of Mississippi*, supra, also recognized that this Court has ruled that an exclusionary statute, such as the Mississippi statute in question, does not violate the provisions of the Fourteenth Amendment.

Counsel for respondent would respectfully submit that the petitioner in this case was given a fair and impartial

trial in the trial court of the State of Mississippi and that on two occasions the Mississippi Supreme Court carefully considered his appeals and only after the second conviction did it confirm the judgment of the trial court. All of the constitutional rights of the petitioner were carefully protected by the trial court and the Mississippi Supreme Court and this Petition for Writ of Certiorari is completely without merit.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOE T. PATTERSON, *Attorney General*

By

GUY N. ROGERS
Assistant Attorney General
State of Mississippi
Attorneys for Respondent

CERTIFICATE

I, Guy N. Rogers, Assistant Attorney General, Attorney for Respondent, State of Mississippi, do hereby certify that I have this day mailed, postage prepaid three true and correct copies of the foregoing Brief in Motion to Petition for writ of Certiorari to Barbara A. Morris, 20 West 40th Street, New York, New York, 10018.

Witness my signature this 17th day of November, 1967.

GUY N. ROGERS
Assistant Attorney General
Post Office Box 220
New Capitol, Jackson, Mississippi

APPENDIX A

Opinion of the Supreme Court of Mississippi

IN THE

SUPREME COURT OF MISSISSIPPI

No. 44,352

CLOUDIES SHINALL,

against

STATE OF MISSISSIPPI,

RODGERS, *Justice*:

This is the second time this case has been appealed to this Court. On the former appeal (*Shinall* v. *State*, 187 So. 2d 840, 1966), we reversed and remanded the case because of an apparent racial discrimination in the selection of the grand and petit juries. When the mandate of this Court reached the Circuit Court of Forrest County, Mississippi, the appellant was reindicted by another grand jury. He was again tried and convicted of murder, and sentenced to suffer death. Appellant has again appealed to this Court and contends that the trial court committed prejudicial error and that a new trial should be granted to him.

The defendant, Cloudies Shinall, appellant here, shot and killed Frederick L. Humphrey, a Constable of Justice of the Peace District No. 3 of Forrest County, Mississippi. The constable was not in his district at the time of the

shooting. The defendant is a Negro, and the constable was Caucasian.

The record reveals that on the day of the homicide, the defendant borrowed an automobile from a friend, L. C. Leggett, for the purpose of going to get his pay check. He took two friends with him, and when they returned to the defendant's neighborhood, Palmer's Crossing, they visited several taverns where they consumed a large quantity of beer. During the afternoon, someone in the automobile with the defendant discovered a twenty-two caliber pistol, holster and belt under the front seat of the automobile. The defendant took the pistol and buckled it upon his person. He exhibited the pistol in one of the beer taverns, and when officers came by the tavern, he gave the pistol, holster and belt to the proprietress. When the officers left, she returned them to the defendant. The defendant and his companions continued to move from one beer tavern to another, until a short time after dark. They got into Leggett's automobile again in front of the "Heat Wave", and started to drive away, but the motor ceased to function at a place where there was a ditch in the road. Thus, the defendant was in the process of navigating the rough place in the road. The constable pointed the light beam of his flashlight toward the automobile; whereupon, the defendant drove away at such a rapid rate of speed his companions became alarmed. They beseeched defendant to slow his speed or stop because they were afraid he would wreck the car and cause their deaths.

In the meantime, Constable Humphrey had gotten into an automobile belonging to another constable and had begun to follow the automobile driven by the defendant.

Appendix A

The defendant drove at a rapid rate of speed across a blacktop road and made several turns until he came into a curve in the road in front of the Welborn home. The defendant was going at such a fast rate of speed he could not traverse the curve and the automobile went out of control into the driveway of the Welborn home, where it struck a wire fence. The constable came up behind the automobile, stopped his car, got out, left the lights burning, and approached the automobile driven by defendant. Two witnesses said the officer had a flashlight in his hand. One witness said he also had a pistol in his hand. The constable directed the passengers to get out of the automobile, and when they alighted, the officer looked into the front seat where defendant was. At this time a gun fired. One witness saw the flash of the gun, and another witness testified that the defendant shot the officer. The two passengers ran away, and when they had gone some distance, they heard two more pistol shots.

Later that night, the defendant told one of his companions that after they fled, he walked up to Humphrey and shot the "son-of-a-bitch in the head." He later told L. C. Leggett, owner of the automobile, that he had killed "the son-of-a-bitch", naming Humphrey, with Leggett's pistol. The pistol was later recovered from Leggett. It was mailed to the Federal Bureau of Investigation, together with a bullet found in the body of deceased by the coroner, and upon examination by them it was discovered that the bullet from the body of the deceased matched the other bullets fired from the pistol of L. C. Leggett, so that an expert witness was able to testify that the bullet found in the body of the constable was fired from the pistol belonging to L. C. Leggett.

Appendix A

I

After the second indictment was presented by the grand jury, the defendant moved to quash the indictment upon the ground that there was a systematic discriminatory selection of the members of the grand jury. The attorneys for the State and defendant entered a stipulation and offered testimony on this subject. It appears that since the former trial of this case, the Clerk of Forrest County has performed his duty as ordered by the Federal Court in that he has registered all colored persons who desired to vote. The record reveals that the Board of Supervisors has selected names for jury service without regard to race since the former trial of this case. The testimony reveals that since November 1965 nine Negroes have served on three grand juries in Forrest County; that Negroes have served upon petit juries in criminal cases; that a special venire of seventy-nine names summoned on the trial in the instant case contained fourteen Negroes. The trial judge overruled the motion to quash the indictment, and later overruled a motion to quash the petit jury. He took judicial notice that Negroes were not discriminated against in the selection of jurors.

On appeal to this Court, appellant complains that: (1) women were not required to serve on juries in Mississippi; (2) Negroes were systematically excluded from jury selection because, (a) they were being selected as they had been for many years, (b) that the Members of the Board of Supervisors did not select persons of "good intelligence, sound judgment, and fair character" as required by Mississippi Code Annotated section 1766 (1956) since they had selected persons they did not know;

and (c) the State of Mississippi peremptorily challenged qualified colored persons left on the jury after the voir dire.

We are of the opinion that these contentions are not well-taken for the following reasons: (1) Women are not required to perform jury duty in Mississippi nor does the Federal Constitution require women to serve on juries in state courts. Mississippi Code Ann. § 1762 (1956); *State* v. *Hall*, 187 So. 2d 861 (Miss. 1966); *Pendergraft* v. *State*, 191 So. 2d 830 (Miss. 1966). (2) The evidence in this case shows that the Supervisors of Forrest County are now selecting juries from the list of qualified voters of that county without regard to race or ethnic groups, and that the constitutional impediment of discriminatory jury selection for which this case was previously reversed has been removed. All qualified persons desiring to vote are now being registered by the Circuit Clerk of Forrest County, and from this list juries are now being drawn. (a) The argument that the juries are still being selected as they have been for many years is not well-taken, because the list from which the juries are now selected is a new list of qualified voters, including Negro citizens who have registered to vote. (b) We are of the opinion that Mississippi Code Annotated section 1766 (1956) in which the Board of Supervisors is directed to select "qualified persons of good intelligence, sound judgment, and fair character" is not a jurisdictional requirement, and although it is the duty of the Members of the Boards of Supervisors to select good citizens for jury service (*Black* v. *State*, 187 So. 2d 815, Miss. 1966), nevertheless, the jury laws of this State are directory and the selection of the jury list in an informal or irregular manner does not render it

illegal. Miss. Code Ann. § 1798 (1952). The contention of appellant that the State of Mississippi, in the instant case, discriminated against Negroes by peremptorily challenging five Negroes, is not supported by the facts or by the law. The voir dire examination shows that most of the persons challenged by the State had been associated with the defendant. Moreover, the State is not required to accept jurors simply because they belong to the same ethnic group as the defendant. *Swain* v. *Alabama,* 380 U. S. 202, 85 Sup. Ct., 324 (1965); *Brown* v. *Allen,* 344 U. S. 443, 222 F. Supp. 10 (4th Cir. 1952).

II

The appellant contends that the attempted arrest of the appellant by Constable Humphrey was illegal because he was not a duly elected constable in District 3 and that when he began pursuit of defendant, no crime had been committed by him for which arrest should have been made. It is argued that deceased had a bad reputation for being a turbulent and violent person who arrested persons without probable cause, and for that reason the appellant had a right to resist an unlawful arrest and defend himself to the extent of taking the life of the deceased Constable Humphrey.

There is a list of cases heretofore decided by this Court in which we have held that a person may resist an unlawful arrest by such force as may be necessary, short of taking human life. Note 1. We are of the opinion that this line of authority is not applicable in the instant case because, under the facts here presented, the constable was attempting to make a legal arrest. Peace Officers and citizens may at any time arrest persons who are committing crimes in their presence, or to prevent a

breach of the peace. Miss. Code Ann. § 2469 (1956). Moreover, the statutory law of this State expressly enjoins all constables "to keep and preserve the peace within his county". Miss. Code Ann. § 3887 (1956).

The defendant contends on appeal that at the time the constable began following him, he had committed no crime for which he could be lawfully arrested. Appellant cites the case of *Smith* v. *State,* 240 Miss. 738, 128 So. 2d 857 (1961) to support this contention. We are of the opinion that the *Smith* case is not authority here because the officer in that case had begun the pursuit of the defendant *before* the defendant had violated the traffic laws of the State. Whereas, in the instant case the constable did not begin pursuit of the defendant until *after* the defendant had driven away at such a fast rate of speed his companions became alarmed for their safety. It is pointed out by *Blashfield* in his *Cyclopedia of Automobile Law and Practice,* Volume 8 (Perm. Ed.) section 5372, page 117, (1950), that reckless driving was a breach of the peace under the common law. Moreover, reckless driving is a misdemeanor under the statutory law of Mississippi. Miss. Code Ann. § 8175 (1956). See *Barnes* v. *State,* 249 Miss. 482, 162 So. 2d 865 (1964). We are of the opinion that the attempted arrest of the defendant, under the facts shown here, was not an illegal attempt to arrest him.

III

On the second trial, the defendant did not testify, but he sought to introduce certain witnesses to prove that the deceased constable had a bad reputation in the community for violence; that he had arrested some persons without probable cause and had pistol-whipped two of

the proffered witnesses. The defendant also sought to show that Wilmer Kitchens, the regular Constable of Justice of the Peace District No. 3, worked with the deceased Humphrey and that as a team these two constables had a bad reputation for harassing colored citizens in and around beer taverns at Palmer's Crossing. The defendant offered to show that the deceased had drunk from a half-pint bottle of gin a short time before he was killed. The defendant also contends that he was not permitted to show that someone had threatened his life, and that bullets had been sent to defendant.

It will be observed that this testimony falls into seven distinct categories: (1) general reputation of deceased for violence; (2) reputation for unlawful arrests; (3) bad reputation of Constable Kitchens; (4) particular incidents of violence to others; (5) unlawful assault upon women by third persons; (6) uncommunicated threats; and (7) deceased had drunk gin a short time before his death.

A minute examination of the proffered testimony has convinced us that the trial judge was correct in excluding the evidence, and for that reason we discuss each category of evidence separately (1 and 2). The testimony of certain witnesses as to the character of the deceased constable was properly excluded because this evidence was not admissible under the facts in this case. Ordinarily the character or reputation of the deceased person is not involved as part of the issue in a murder case, and proof relative thereto is generally inadmissible. It has often been pointed out that the violent, revengeful or bloodthirsty character of deceased cannot be shown as an excuse for a homicide because the un-

provoked killing of a bad man is no less murder than the killing of the most peaceful and law-abiding person in the community. *Spivey* v. *State,* 58 Miss. 858 (1881); *Chase* v. *State,* 46 Miss. 683 (1872); *Jolly* v. *State,* 13 S. & M. 223 (Miss. 1849); *Dowling* v. *State,* 5 S. & M. 664 (Miss. 1846); 40 C. J. S. Homicide § 222 (1944).

There are exceptions to this general rule. The violent, dangerous and turbulent character of a deceased may be shown: (A) when, from the circumstances of the case, it is a part of the *res gestae;* (*King* v. *State,* 65 Miss. 576, 582, 5 So. 97—1888); (B) where the evidence of the homicide is wholly circumstantial (*Chase* v. *State, supra*); (C) where it is doubtful as to who the aggressor was at the time of the homicide (*Jolly* v. *State, supra; Cotton v. State,* 31 Miss. 504 (1856); or (D) where the immediate circumstances of the killing render it doubtful as to whether or not the act was justifiable. *Wesley* v. *State,* 37 Miss. 327, 346 (1859); *Chase* v. *State, supra.*

Before testimony of bad character of a deceased is admissible under one of the exceptions to the general rule, the evidence must show that the issue of self-defense must at least be in doubt. *Spivey* v. *State, supra; Moriarty* v. *State,* 62 Miss. 654, 661 (1885); *Smith* v. *State,* 75 Miss. 542, 23 So. 260 (1898); *Anderson* v. *State,* 181 Miss. 300, 179 So. 560 (1938); *Wesley* v. *State, supra.* It is said in Wigmore on Evidence Volume 2 (3d Ed.) section 246, pages 44, 49-52 (1940) that:

> "Another and more specific form of limitation is the doctrine of 'overt act', peculiarly developed in Louisiana and Florida. The notion here is that the deceased's reputation can have a 'bona fide' bearing on the defendant's apprehension only where there

occurs, at the time of the affray, some conduct of the deceased which might be otherwise colorless, but when interpreted by his known character becomes apparently an act of aggression. Thus there must be some 'overt act', *i.e.* of possible aggression before the reputation-evidence can be received. This is a wise and fair limitation, provided it be not further refined by details which generate into quibbles,—a proviso not always observed.

"Two peculiar questions may arise under the overt-act form of the doctrine (1) Shall the question whether an overt act is sufficiently evidenced to lay the foundation for the reputation-evidence be *left entirely* in the hands of the *trial Court?* Unless our law is to become a mass of quibbles which no practitioner can master and every murderer will welcome, the answer must be in the affirmative. (2) May the defendant's mere unsworn assertion of an overt act (where permitted instead of his sworn testimony) be considered as in itself some evidence of an overt act? It certainly should be; but whether it is sufficient evidence for the trial court should never be considered on appeal."

The only evidence in the record indicative of an overt act toward the defendant by the constable was the testimony of Lewis Willie Smith. He testified that the constable came toward the automobile driven by the defendant, after it had gone out of control and into a ditch, with a flashlight and a gun in his hand. As against this testimony, Smith testified that the constable did not threaten the defendant, and James Anderson, the other passenger in defendant's automobile, testified that he did not see a gun in the hand of the constable, and that

the constable did not threaten either of the parties at the time of the attempted arrest. The malice of the defendant was clearly shown by the statements he made after the homicide, that he had walked up to the constable after he fell and shot "the son-of-a-bitch" again in the head. Moreover, the defendant knew that the person asking him to disembark was an officer and that it was his duty to submit to the arrest. *Pickett* v. *State,* 139 Miss. 529, 104 So. 358 (1925); *Mullis* v. *State,* 27 S. E. 2d 91 (Ga. 1943). Defendant had no right to kill the officer merely because he was afraid of him, or was afraid he would arrest him "for nothing."

(3) The testimony that Contable Kitchens had a bad reputation for violence was not admissible as evidence in the murder case where Constable Humphrey was killed, since Kitchens was not present at the time of the homicide. 40 C. J. S. *Homicide* § 223 at 1143, § 274 at 1229 (1944).

(4 and 5) Testimony of antecedent specific acts of violence alleged to have been committed by deceased was not admissible to show bad character. *Newsome* v. *State,* 197 Miss. 797, 20 So. 2d 708 (1945). Details of a previous difficulty between the deceased and a third person prior to the homicide is inadmissible to show bad character of the deceased. 40 C. J. S. *Homicide* § 210 at 1119 (1944); *Rich* v. *State,* 124 Miss. 272, 86 So. 770 (1921); *McCoy* v. *State,* 91 Miss. 257, 44 So. 814, 815 (1907); The Chamberlayne *Trial Evidence* § 621 at 591 (1936); *Thompson* v. *State,* 84 Miss. 758, 36 So. 389 (1904); *Carter* v. *State,* 167 Miss. 331, 145 So. 739 (1933).

(6) The proffered testimony rejected by the trial judge and complained of here is the testimony of L. C.

Leggett. He was asked: "Now there had been a time, had there not, when one of the men whom you know was at Lucy Wilborn's place had sent some bullets by you to Cloudies Shinall, is that right? . . . A. He gave me some bullets that was in the back of his car. Q. And what did he say? What was the message he sent? . . . Q. Did someone send bullets with you and say these were what he was going to get Clyde with . . .?" This testimony was clearly incompetent. There is nothing in the evidence to show a threat, and if such a threat had been shown with reference to bullets, it was not shown to have been made by the deceased Humphrey. Moreover, uncommunicated threats are inadmissible in evidence until after it has been shown that the deceased did some *overt act* at the time of the homicide which would cause the slayer to believe that his life was in imminent danger. 26 Am. Jur. *Homicide,* §§ 363, 364 (1940); *Newcomb* v. *State,* 37 Miss. 383, 400 (1859); 40 C.J.S. *Homicide,* § 126 (3) at 1009, § 207 at 1113 (1944).

(7) The appellant complains that he was not permitted to show that the deceased had drunk intoxicating liquor a short time before the homicide for the purpose of showing the state of mind of the deceased at the time of the killing. There are times when it is proper to permit introduction of testimony to show the intoxicated condition of the deceased for the purpose of showing whether or not there was any present and pressing necessity for the defendant to take the life of the deceased to protect his own, or to prevent great bodily harm. *Byrd* v. *State,* 154 Miss. 742, 123 So. 867 (1929); *Jones* v. *State,* 227 Miss. 518, 86 So. 2d 348 (1956). On the other hand, evidence of the intoxication of the deceased is

irrelevant where the testimony shows that the defendant was the aggressor, or there is no testimony evincing the necessity for the accused to kill the deceased. 40 C.J.S. *Homicide,* § 224 at 1144 (1944).

At the time defendant offered testimony to show that the deceased had imbibed intoxicating liquor, there was no evidence indicating a necessity on the part of defendant to kill the constable, and testimony that the officer had been drinking was inadmissible.

IV

The appellant argues that the totality of the proceedings in the case violates defendant's right to due process of law under the Fourteenth Amendment to the Constitution of the United States. On the contrary, there is very little excuse given by the defendant for killing the constable under the facts in this case. The testimony is abundant that the defendant not only shot the constable at a time when the officer was trying to arrest him, but that after the constable had fallen and was helpless, he exhibited his malice by going up to the prone body of the officer and shooting him in the back of the head. We are of the opinion that the testimony is more than sufficient to show that the defendant was guilty of murder.

V

The appellant complains that he was not given instruction Number Five, which provides that if the jury believed, among other things, that the deceased officer pointed a pistol at the defendant, and he was in fear that bodily harm would be inflicted upon him, or that he would be killed, then it was the duty of the jury to

find the defendant "not guilty." This instruction was properly refused because one does not have the right to kill another merely because he is afraid of him; nor may one kill another because he is afraid that he will receive some bodily harm. The law does not justify one's taking the life of a person in defense of his own person except where there are reasonable grounds to apprehend a design to commit a felony or do some great personal injury to the accused, and there shall be imminent danger of such design being accomplished. Miss. Code Ann., § 2218 (1956). Moreover, there was no testimony in the instant case that the officer pointed his gun at the accused.

Defendant's instructions Numbered 10, 11, 13, 14 and 17 refused by the court are subject to the same criticism as is made of instruction Number Five. Moreover, instructions as to the general reputation of the deceased were properly refused.

Instruction Number Twenty advises the jury that a constable has no jurisdiction to arrest a person beyond the confines of the district for which he was elected. This was error. As above pointed out, it is the duty of a constable to make arrest anywhere in the county for crimes committed in his presence (Miss. Code Ann., § 2467—1956), or to preserve the peace (Miss. Code Ann., § 3887—1956), and he may be fined for failure to perform his duties (Miss. Code Ann., § 3892—1956). The instruction was properly refused.

The manslaughter instruction, Number Twenty-four, refused by the court, is repetitious of instruction Number Twelve granted to the defendant; moreover, the

phrase "then you must find for the defendant" is confusing.

The defendant complains that instruction Number Six for the State is erroneous and is reversible error. It is as follows:

> "The Court instructs the jury for the State that in order to justify a homicide on the plea of self defense there must be something shown in the conduct of the deceased indicating a present intention to kill or do some great personal injury to the slayer, and imminent danger of such intention being accomplished; mere fears or beliefs are insufficient. The danger must be such as to lead a person reasonably to believe that the killing was necessary to prevent the deceased from killing him or doing to him some great bodily harm."

This instruction is based upon Mississippi Code Annotated, section 2218 (1956).

Our trial courts have been granting, and this Court has been sustaining, this instruction, or one of similar verbiage since the early days of our State's jurisprudence. In *Coleman* v. *State,* 22 So. 2d 410 (Miss. 1945), this Court said that a similar instruction had been approved since *Wesley* v. *State,* 37 Miss. 327 (1859). See: *Dobbs* v. *State,* 200 Miss. 595, 29 So. 2d 84 (1947); *Bailey* v. *State,* 174 Miss. 453, 165 So. 122 (1936); *Johnson* v. *State,* 140 Miss. 889, 105 So. 742 (1925); *Harris* v. *State,* 47 Miss. 318 (1872); *Bailey* v. *State,* 174 Miss. 453, 165 So. 122 (1936); *Head* v. *State,* 44 Miss. 731 (1871); *Ransom* v. *State,* 149 Miss. 262, 115 So. 208 (1928); *Kendrick* v. *State,* 55 Miss. 436 (1877). This identical

instruction is held to be good in the case of *Holmes* v. *State,* 199 Miss. 137, 24 So. 2d 90 (1945).

The defendant obtained fifteen instructions, and the State obtained seven. The instructions for the defendant were liberal and we find no reversible error in the granting, or refusing, instructions in this case.

VI

The appellant complains that the trial court committed reversible error in permitting the pathologist, Dr. Cook, to testify that the powder burns on the flesh of the deceased indicated that the gun was a short distance from the body when fired. We are of the opinion, however, that the testimony was properly admitted. King v. State, 251 Miss. 161, 168 So. 2d 637 (1964).

VII

The evidence with reference to the head wounds of the deceased was properly admitted, and corroborated the testimony of witnesses that, after the officer fell, accused shot him in the back of the head, and this goes directly to the issue of malice as an element in the charge of murder.

There are other alleged errors assigned, and although they were not argued, nevertheless, we have carefully examined these assignments of error, and we do not find error for which this case should be reversed.

We therefore affirm the judgment of the trial court and set June 30, 1967, as the day for the execution of the appellant Cloudies Shinall in the gas chamber, as required by law.

Appendix A

AFFIRMED.

ALL JUSTICES CONCUR.

Note 1: *Bergman* v. *State*, 160 Miss. 65, 133 So. 208 (1931); *Shedd* v. *State*, 203 Miss. 544, 33 So. 2d 816 (1948); *Williams* v. *State*, 120 Miss. 604, 82 So. 318, 84 So. 8 (1919); *Williams* v. *State*, 127 Miss. 851, 90 So. 705 (1922); *Fletcher* v. *State*, 129 Miss. 207, 91 So. 338 (1922); *Walker* v. *State*, 188 Miss. 177, 189 So. 804 (1939); *Cutrer* v. *State*, 43 So. 2d 385 (Miss. 1949); *Coleman* v. *State*, 218 Miss. 246, 67 So. 2d 304 (1953).